Corporate Organization and Management

By

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H. POTTER

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PREFACE

In 1903 the author's work "Corporate Management" was published, followed in 1904 by its companion volume, "Corporate Organization." Both these volumes met with a flattering reception and have since gone through a number of editions.

In the two volumes there was, of necessity, much duplicated matter, such as the discussions of charter provisions, by-laws, election of officers, etc., etc., and it seemed to the author that a combination of the two books in one volume with the elimination of this duplicated material would give a more complete and more convenient work—one that would better meet the needs of those who organize and manage corporations.

In the present volume this has been done. All duplicated and obsolete material has been deleted, and the volume as a whole has been brought sharply up to date. While this has been done, no necessary material has been omitted, all the valuable features of both volumes being retained.

This thorough overhauling of the material of the present volume has necessitated a very large amount of work, which has, for the larger part, been done—and done with remarkable efficiency—by Miss Helen Potter of the New York Bar. Miss Potter has gone thoroughly and carefully through the two volumes to be combined, eliminating, correcting, verifying, and making such changes as the late court decisions and Federal and state legislation have made necessary.

The purpose of the present work is to furnish a compact, practical, and conveniently arranged manual of corporation law and procedure—one that shall meet the demands of

lawyers, accountants, corporation officials, and business men generally. At the same time the author trusts that the book may meet the needs of that continually increasing class, the students of business, for a reliable and fairly comprehensive text on the subject of corporations.

While the present volume covers as far as may be the practical details of incorporation, an equal value will probably be found in its suggestions. The innumerable variations that arise in differing incorporations cannot all be specifically covered. The methods, the discussions, the instances, the procedure, and the forms given do, however, cover the field so completely that the solution of any particular problem should be readily drawn from the suggestions of the text.

It is to be remembered that all matters of business law are liable to be affected by the varying and continually changing laws of the different states. This is particularly true of corporation law, and any complete discussion of the state statutes that modify its principles is utterly precluded in this work by the limits of space. Therefore, while frequent reference is made to these statutes they must be consulted in each state for any accurate determination of the local regulations and requirements of that state. This is not, however, a difficult requirement, for in all the more prominent corporation states, the statutes relating to corporations can either be obtained from the Department of State for the asking, or otherwise can be purchased in convenient pamphlet form. Wherever the term "statutes" is used in the present volume, reference is intended to the statutes enacted by the legislatures of the various states, and not to the Federal Statutes, unless so specified.

The forms of the present volume have been increased in number until they now cover practically the entire range of ordinary corporate organization and procedure. As in preceding editions, they are given as precedents and without the

usual blanks for variable matter. The author believes that a better idea of the form as a whole is thereby conveyed. Also, the changes necessary to adapt a form to any special need are more readily made from a completed instrument than from one disjointed by frequent and sometimes puzzling blanks.

In conclusion the author wishes to express his sincere appreciation of the very friendly reception accorded the preceding editions of his works on corporation procedure. He can hardly hope for a more favorable reception for the present volume, but he trusts that the new form, the elimination of duplicated material, and the changes of arrangement have resulted in a more convenient, and possibly a more valuable work.

THOMAS CONYNGTON.

New York City,
August 1, 1917.

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Corporate Organization and Management

BOOK I

THE CORPORATE SYSTEM

Corporate Organization and Management

Part I—The Corporate Form

CHAPTER I

ADVANTAGES OF THE CORPORATE FORM

§ 1. Business Organization

Modern commercial and industrial activity require a form of organization under which management and capital may safely combine for the conduct of business undertakings.

The usual forms of business organization are the partnership and the corporation. A partnership is satisfactory under some circumstances, and has a lack of formality that is attractive; but where it is desired to limit individual liability or the rights of those interested, or where large interests are involved, or where it is desired to secure investment of capital from those not connected with the management, the enterprise must usually be conducted under the corporate form.

Other forms of business organization, derived or evolved from partnership or corporate origins, have been tried, such as the partnership associations of Pennsylvania and Michigan, the statutory joint-stock company of New York, and associations under declarations of trust in Massachusetts, but as yet none have won general favor. (See Chapters LVIII, LIX.)

It is probable that the future will see the evolution of improved forms of business organization. Entirely new forms may be devised. Present forms may be bettered. Partner-

ships may perhaps be allowed to secure additional capital by issuing non-voting certificates of stock, entitling the holder to participate in profits without involving him in liability. Intelligent legislation could make the corporate form far more useful than it now is. The effective co-operation of men with business ability and men with capital is the end to be sought. Legislation should be had by which this end may be achieved.

§ 2. Characteristic Features of Corporate Form

As already stated, there are but two forms of business combination commonly used for conducting a business or an enterprise—the partnership and the corporation. The one is easily entered into, and as easily dissolved; the other is formal and more permanent. Men may drift into partnership; the law frequently implies it for them, or it may be made by a simple verbal agreement. Incorporation, on the contrary, may be had only by deliberate purpose, carried into effect through prescribed forms of law. A partnership may, and frequently does, exist without the knowledge of the partners; an incorporation is impossible except with the formally expressed concurrence and participation of all the parties.

The general and steadily increasing preference for the corporation over the partnership as a form of business organization is due to the very material advantages offered by the corporation, which may be summarized as follows:

1. Its limitation of stockholders' liabilities to a definite amount.
2. Its distinct legal entity for all business purposes.
3. The stability and permanence of its organization.
4. The representation of the different interests in the corporation and its property by transferable shares.
5. The management of the business by an elected board of directors, acting through officers and agents.

6. The greater ease of securing capital under the corporate form because of its safeguards and advantages.

These characteristic features of the corporate form are severally considered in the following sections of the present chapter.

§ 3. (1) Limited Liability

The subscriber to stock and the holder of stock not fully paid for are liable to the corporation, and indirectly to its creditors, up to the par value of their stock. In other words, if a corporation becomes insolvent, a subscriber to its stock whose subscription is not fully paid, or a holder of stock not fully paid for, can be held liable for the corporate debts up to the amount necessary to make his stock fully paid. In most states of the Union a subscription to stock or the holding of stock involves no further liability than this, and as soon as the face value of stock is paid this liability ceases and the holder is no longer, as a stockholder, responsible for the corporation and its doings.[1] (See §§ 41, 102.)

In a few states there are additional liabilities. Thus, in Minnesota the stockholder is liable, in case the corporation becomes insolvent, for a further amount equal to his original subscription, that is, equal to the par value of the stock he holds. The corporation cannot collect this additional amount, but in case of its insolvency any creditor of the corporation may enforce payment. This double liability formerly existed in several other states, but is now found in Minnesota alone. In California each stockholder is liable for any portion of his subscription that is not paid, and is further liable for such proportionate part of the corporate indebtedness incurred during the period in which he is a stockholder as his stock

[1] 1 Cook on Corp., §§ 212, 213, 214, 241, 242; United States v. Stanford, 161 U. S. 412 (1896).

bears to the total capitalization of the corporation. Stockholders in national banks, and generally stockholders in banks, trust companies, and other moneyed corporations, are, in addition to any subscription liability, held liable for an amount equal to the par value of their stock in case of the insolvency of their corporation. In some few states stockholders may be held for any debt due by a corporation to a laborer, servant, or other employee.

The liability on unpaid stock is generally understood and is not inequitable. The further statutory liabilities, save those of moneyed corporations, are unfortunate, because of lack of uniformity and their uncertain action. Not infrequently they work serious hardships where stock is purchased in ignorance of their existence. They are always productive of litigation and the states in which they are found are to be avoided for purposes of incorporation. (See § 41.)

These statutory liabilities, however, are exceptional and, in the great majority of the states, the one general rule prevails that a stockholder whose stock has once been paid in full is liable neither to assessment by the corporation nor to action by its creditors. The property of the corporation in which he is interested may be swept away, but his liability is fixed and limited. His investment will be lost but that is the worst that can happen. The unlimited responsibility of the partnership does not exist.

§ 4. (2) Legal Entity of Corporation

In the partnership every member must be made a party to all actions at law either by or against the firm, and no partner may sue or be sued by the partnership as a partnership. He cannot contract with his firm, nor enforce its obligations to him. The great inconvenience of this is manifest. On occasion it results in serious loss and injustice. It is a material defect of the system.

The corporation, on the contrary, is a distinct legal entity, entirely apart from its membership. It may sue and be sued under the corporate name. It may contract freely with its stockholders and even, under proper conditions, with its officers and directors. It may bring suit to enforce these contracts, and in turn may be sued by stockholders, officers, or directors. In short, for all purposes of ordinary business the corporation has a distinct, individual existence of its own.[2]

§ 5. (3) Permanence

The partnership depends for its continued existence upon the continued life, sanity, solvency, and consent of each one of its members. It is always readily, and often unavoidably, terminated. This easy and, at times, undesirable dissolution is disturbing, and, with its possible resulting loss of business and good-will, is a serious defect of the system.

In the corporation, permanence and stability are characteristic features. The organization endures until terminated (1) by voluntary dissolution, which must usually though not invariably be by unanimous consent of the stockholders, or (2) by the expiration of the period for which it was formed, or (3) by judicial proceedings, or (4) by forfeiture of charter by the state. These are the only methods recognized by law by which the corporation may be terminated. The lives, the mental or financial condition of its stockholders, the antagonism of an individual or faction, need have no effect on its existence. This permanence adds materially to the value and efficiency of the corporation as a mechanism for the transaction of business.

In some few states the maximum term for which charters are granted is twenty years. In others it is fifty. In others there is no limitation, and the duration of the corporation may

[2] 1 Kyd on Corp., p. 13; Angells & Ames on Corp., § 1; 1 Cook on Corp., §§ 1, 6, 11; Trustees of Dartmouth College v. Woodward, 4 Wheaton (U. S.) 518 (1819).

be fixed at any desired period, or may—at least in theory—be made perpetual.[3]

§ 6. (4) Stock System

In a partnership there is no satisfactory or generally recognized method of expressing and representing the individual interests of the partners. Nor is there any way, save by consent of all the parties interested, by which a partner may transfer his interest in whole or in part to another person. Such a transfer, unless by general agreement, dissolves the firm.

In stock corporations the exact reverse obtains. Under a fixed and well-ordered system, the various interests of the parties in whom the ownership of the corporation rests are expressed as equal parts, or shares, of the whole. These shares are, as a matter of convenience, represented by quasi-negotiable certificates of stock, which may be transferred as desired with but little formality and without affecting the operations of the corporate business. Each stockholder votes according to the number of shares he holds, and participates in dividends in like proportion. The convenience and the obvious business advantages of this method of holding and transferring interests in the corporation are the most attractive features of the corporate system.

§ 7. (5) Corporate Mechanism

The partnership has no definite method of action or system of management. Any partner may bind the partnership within the scope of its business and no one partner has any more legal authority than another in partnership affairs. There is no legal way of enforcing the wishes or decisions of the majority. On the other hand, the stable, well-defined, and

[3] 2 Cook on Corp., § 628; Swan, etc., Co. v. Frank, 148 U. S. 603 (1893).

orderly system of administration characteristic of the corporation is one of its most admirable and important features. The election of a board of directors by the stockholders voting according to their stock interests, the election of officers and the appointment of agents by this board for the direct conduct of the business, the supervision and control of these officers and agents by the board, the orderly action of the board as a body at meetings called in accordance with by-law or charter requirements—these constitute the best working mechanism for the conduct of a business enterprise that has yet been devised.

The several functions of the stockholders, directors, and officers, the well-defined laws and usages governing every feature of corporate operation, the records to be kept, the reports to be made, and the protection afforded its members, combine to make a system compared with which the workings of the ordinary partnership are crude and inadequate.

The corporate organization may be and should be based on a division of powers and duties and the operation of mutual checks and balances. If well arranged and properly conducted its operation is effective and satisfactory. It must be observed, however, that the ideal corporate organization is not ordinarily attained, being lost through ignorance, negligence, or lack of experience. Safeguards and checks are omitted or purposely set aside by promoters and exploiters; a charter and by-laws well adapted for one corporation often are stupidly duplicated for the use of another corporation of wholly different design and purpose; frequently measures of protection or convenience are omitted through sheer ignorance on the part of the incorporators.

To avoid such errors, and, with due regard to the rights of all concerned, to secure an effective and smoothly working corporate mechanism, requires skill and intelligence in the organization of the corporation. To maintain its proper oper-

ation thereafter demands an honest, capable administration and watchful care on the part of those interested.

It may be stated in passing that no system of conducting business has been or can be devised that will protect the interests of those concerned automatically and without effort on their part. Our corporation laws are, it must be admitted, far from perfect, but the best laws are of no effect unless enforced, and the most effectual and well-devised system of business organization may be turned to evil ends unless efforts in this direction are opposed. All that can or should be done by the corporate organization is to afford the weak an opportunity to protect themselves should the need arise. If they will not avail themselves of such opportunity when the time comes, it is they who are at fault, not the system.

§ 8. (6) Attractiveness to Investors

Speaking generally, any considerable combination of capital is impossible under the partnership system. No matter what the merits of the enterprise nor how great the inducements offered, they are outweighed by the dangerous liabilities and uncertain operation of the unincorporated form. For this reason any appeal to the investing public on the basis of a partnership or joint-stock association is foredoomed to failure.

On the other hand, the corporate form has been found most attractive to investors. It enables them to invest or participate to a definite extent without rendering themselves indefinitely liable. It has a continued period of duration, usually lasting until insolvency or voluntary liquidation. The business interest obtained may be sold, transferred, or transmitted to posterity with little formality and without material expense. Its mechanism operates in well-defined grooves and the rights and liabilities of all concerned are well known. It has its own personality, and stockholders are not involved by its ac-

tions, nor are they responsible for its obligations beyond their liability, if any, on stock.

For these reasons, if it is desired to raise capital for an enterprise or to increase the amount already invested, the obvious method and the one almost invariably pursued is to incorporate the undertaking and sell the securities of the company so formed.

In this connection it may be observed that if the attractiveness of the corporation as a field for investment is to be preserved, it is essential that those features which serve to protect the interests of the investor shall be maintained and their scope enlarged. Under existing laws, it has happened many times that exorbitant and even fraudulent prices have been paid for the properties taken over by newly organized corporations. Undue power and emoluments have been given to the original promoters. Rights of minority stockholders have been denied, and the smaller investors have been debarred from any knowledge of the inner corporate operations.

The immediate result of such practices has been very prejudicial to promotion. Much money that would otherwise have been available for the development of new enterprises has gone into the better known bonds and particularly into the safe haven of the savings bank, where returns are small but where all the conditions are clearly defined and both principal and profits are secure.

§ 9. Résumé

From the preceding considerations it seems that the characteristic features of the corporate form which have led to its extended use are: (1) its efficiency, which is curtailed only by ignorance or lack of skill in its organization; (2) its convenience, which is inherent in the corporate system and requires no special attention; (3) its safety, which is the one point above all others that requires attention, not only because

it is the one most apt to be overlooked, neglected, or omitted by intent, but because it is the most important feature of any business enterprise in which a number of people are concerned.

The corporation is, from its nature, a democratic institution and the safety of the investors' interests should be a first essential. The majority must rule, but the rights of the minority demand that this rule be fair, open, and honest. Due adjustment of all equities should be made so that all interests are represented, none are favored at the expense of others, the general business is facilitated, and the profits are fairly apportioned. This is the true ideal of corporate organization, and that corporation is the most ably organized and conducted which most nearly approaches this ideal.

CHAPTER II

DISADVANTAGES OF THE CORPORATE FORM

§ 10. General

The corporate form has its advantages and also its disadvantages. Its advantages have been discussed with some detail in the preceding chapter. Its disadvantages—discussed in the present chapter—lie mainly in the somewhat invidious taxes imposed upon corporations and the somewhat onerous reports required of them by state and federal legislation. The objection so frequently urged against the corporate form that it does not afford protection to minority interests is considered elsewhere.

§ 11. Onerous Legislative Requirements

Within the last few years the costs and burdens imposed on corporations by the legislatures of the various states and finally by federal legislation have materially increased—so much so that before deciding in any specific case to incorporate a business it is advisable to investigate carefully and determine just what obligations the proposed incorporation will entail.

Where it is desired to secure the investments of a number of people in a business enterprise, incorporation offers such advantages that it is practically the only possible form, and in such cases the only recourse is to minimize the disadvantages as far as may be done. Not infrequently, however, when the incorporation of an existing partnership or individual business is under consideration, the conscientious lawyer is compelled to counsel against such a step and advise his clients to bear the

ills they have rather than to incur the taxes, annual reports, and other onerous burdens imposed on corporations.

According to a famous French minister, the whole problem of taxation is, as in plucking geese, to secure the most feathers with the least squawking. Proceeding upon this primitive principle, both state and national legislators have found the line of least resistance in the corporation and have taxed it unreasonably.

As a matter of fact and fairness, private corporations should not pay higher taxes or be called upon for more onerous reports than individuals or partnerships engaged in like enterprises, save as to the small fees for filing and recording where corporate instruments are required to be filed in public offices. The business corporation, as such, enjoys no franchise or monopoly; it merely employs a convenient form of business organization. If this form facilitates the transaction of business and is superior to the partnership form of business organization, its use should be encouraged, not hindered.

Holding corporations and trust combinations should be prohibited if they are harmful, for taxes levied on them are no compensation for the harm they do, and do not benefit those who suffer from their abuse of power; public utility corporations may well pay some compensation to the public for the monopolies they enjoy, either in increased taxes or in the form of regulated rates; but the ordinary private corporation should not be hampered unnecessarily in any way, and should be taxed only for the property it holds and at no higher rate than individuals and partnerships.

In those localities where it is customary to discourage enterprise and punish industry by levying occupation taxes, corporations should pay the same as individuals and partnerships but no more. In other words, the corporate form should bear its part of the burden of taxation but should not be handicapped with more.

§ 12. Summary of Taxes and Reports

The taxes and reports required of corporations may be generally summarized as follows:

Taxes:

1. Organization taxes payable to the state of incorporation.
2. Annual franchise taxes paid to the state of incorporation.
3. Annual taxes on property.
4. State income taxes.
5. State inheritance taxes (in most states).
6. Stock transfer taxes (in New York, Massachusetts, and Pennsylvania).
7. Taxes and license fees in each state outside the home state in which the corporation does business.
8. Federal taxes.

Reports:

1. Local tax reports.
2. State tax reports.
3. Federal tax reports.
4. Annual reports of officers, etc.
5. Reports in each state outside the home state in which the corporation does business.

These corporate taxes and reports will be severally considered in the following sections.

Taxes

§ 13. (1) Organization Taxes

These are taxes imposed by the state as a preliminary to incorporation. They range from a nominal fee, as in Arizona, to a tax of one-third of one per cent on the entire authorized capital stock, as in Pennsylvania. In connection with the tax

there are included sundry filing fees that increase the total. In themselves, the organization tax and fees are not serious as they have to be paid but once. (See Chapter VI, "Cost of Incorporation.")

§ 14. (2) Annual Franchise Taxes

The amount of the annual franchise tax, as in the case of the organization tax, varies widely. In Louisiana, Nevada, and some few other states, there is no franchise tax, and from this it ranges up to one-half of one per cent on actual values in Pennsylvania. The tax is a distinct special imposition upon the corporate form—a payment for the privilege of transacting business as a corporation. It is in addition to, and entirely separate from, the annual property taxes mentioned in the next section. The franchise tax, while not entirely equitable, is a source of much revenue to the more important incorporating states. (See § 45.)

§ 15. (3) Annual Property Taxes

These are the same in character and amount as the property taxes paid by individuals and are therefore justly imposed on corporations. The corporation, however, is at some disadvantage in this matter, as it cannot evade the taxes in the very facile way that individuals do. This being true, it frequently happens that an incorporated business pays a much larger property tax than it did before incorporation, even though its property holdings have not increased. The property tax is, however, the one corporation tax to which no just exception can be taken. It is theoretically at least uniform, equitable, and proper.

§ 16. (4) State Income Taxes

Several states, notably Massachusetts, Wisconsin, Connecticut, West Virginia, impose a tax upon the net incomes of

corporations from business transacted and capital invested in the state. In each of these states the tax is upon the income of all corporations doing business in the state, foreign as well as domestic. In West Virginia the tax is an excise tax imposed for the privilege of doing business within the state. Neither Wisconsin nor Connecticut impose any annual franchise tax upon corporations, but in West Virginia the excise tax is in addition to the other usual taxes, making the corporate burden a heavy one.

New York has recently imposed a 3 per cent tax upon the net income of two classes of corporations, "manufacturing" and "mercantile" corporations. The tax is denominated a franchise tax but a new feature is that it exempts the corporations subject to the act from all personal property taxes. As in the other states, the tax applies to foreign as well as domestic corporations and when only a portion of the company's business is transacted within the state the tax is proportionately reduced.

§ 17. (5) State Inheritance Taxes

An inheritance tax is now imposed in all of the more important states, and when incorporation is contemplated the inheritance tax laws of the state of incorporation are an element to be considered, especially in the case where the incorporation is to take place in a state other than the state where the new company does most of its business. Under such circumstances there may in some cases be double and even triple taxation by the states.

If the state in which the decedent resided has an inheritance tax, the transfer will be taxable in that state irrespective of whether the stock held by the decedent is stock of a foreign or a domestic corporation. If the corporation is a foreign corporation a second tax may be imposed in the state of incorporation, depending upon whether that state imposes a tax

upon the devolution of stock in a domestic corporation held by a non-resident.

In New Jersey, stock in a domestic corporation held by a non-resident decedent is subject to the inheritance tax, while in Massachusetts and Delaware it is not. In New York, stock held by a non-resident decedent is not subject to the inheritance tax unless the corporation holds real property in New York in which case the stock is subject to a tax for such proportion of its value as the real property held by the corporation in New York State bears to the entire property of the corporation. The law applies to stock in both foreign and domestic corporations, but excepts from its provisions certain classes of corporations, including transportation, moneyed,[1] and manufacturing companies. At the present time stock in a New Jersey corporation which owns real estate in New York, that is held by a decedent residing in Delaware, might be subject to taxation under the inheritance laws of Delaware, New Jersey, and New York.

Usually the corporation is required either to collect the taxes or to refuse transfer of the stock on its books until the tax has been paid or a waiver is obtained from the state officer charged with the collection of the tax.

§ 18. (6) Stock Transfer Taxes

In New York, Massachusetts, and Pennsylvania a stamp tax of two cents on each $100 of face value is imposed on every sale or transfer of stock in the state, whether the corporation is domestic or foreign. The statutes of the various states and the rulings thereunder are very similar. In addition to the money fines imposed for failure to comply with the law, the statutes of each state provide that a transfer of stock made without paying the tax cannot be made the basis of any

[1] A "moneyed" corporation is a bank, trust company, or other financial institution.

action or proceeding in the state courts. A share of stock sold in one of the three states named and transferred in another is taxable in both jurisdictions.

§ 19. (7) Taxes on Foreign Corporations

All corporations having a place of business in states other than that in which they are incorporated are required to conform to the local laws regulating foreign corporations. These laws usually require a license to do business—for which payment must be made—and the payment thereafter of an annual tax. In some states the tax imposed on foreign corporations is so onerous that it is economy to organize a small local subcompany to conduct the operations necessary in such states.

The taxes imposed on foreign corporations are usually on the same basis as those imposed on domestic corporations, but in most states the franchise or equivalent tax is imposed only on the proportion of capital stock actually employed in state.

§ 20. (8) Federal Taxes

The federal taxes which affect corporations are imposed under the Revenue Acts of September 8, 1916 and March 3, 1917, and are known as the Corporation Income Tax, the Capital Stock Tax, Excess Profits Tax, and Estate Tax.[2]

The Corporation Income Tax is a tax of 2 per cent upon the entire net income received by the corporation from all sources during the year, and extended rules and regulations have been issued by the government directing how "net income" is to be ascertained. The Income Tax reports must be filed on or before March 1 and the tax must be paid on or before June 15 in each year, unless the corporation's fiscal

[2] As this book goes to press there is before Congress for passage a war revenue bill which will radically change the existing revenue laws. If passed in its present form two changes will be made affecting corporations: (1) the Corporation Income Tax will be increased by an additional income tax of 2 per cent; and (2) the law imposing the Excess Profits Tax will be repealed and a tax will be imposed on excess profits earned by corporations whose profits have increased since the pre-war years of 1911, 1912, and 1913; in other words, on "war profits."

year differs from the calendar year, in which case the dates for filing the report and for payment of the tax are adjusted.

The Capital Stock Tax is imposed only upon corporations having a capital stock of the fair average value for the preceding year in excess of $99,000, and is a tax of 1/20 of 1 per cent upon such excess. Reports are due and the tax payable in July of each year.

The Excess Profits Tax is a tax of 8 per cent upon the amount by which the net income of the corporation exceeds the sum of (a) $5,000 and (b) 8 per cent of the actual capital invested. The tax is computed upon the basis of the net income shown by the corporation income tax reports and is payable at the same time as the income tax.

The Estate Tax is an inheritance tax. Corporate stock, like all other forms of property, is subject to the tax, but the law imposes no duty upon the corporation or transfer agent to collect the tax or see that the same is paid before transferring stock upon the corporate books.

Reports

§ 21. (1) Local Tax Reports; (2) State Tax Reports

Local tax reports, made in connection with the usual property taxes, are similar to those of individuals.

A state tax report or reports are required of corporations, primarily for purposes of taxation, but beyond this to supply a record of the officers and directors of the corporation and such other data as may be deemed necessary.

§ 22. (3) Federal Tax Reports

The income tax report is simple to prepare under a well-arranged, modern accounting system, but otherwise it is difficult and troublesome. The report must be filed on or before March 1 and covers the calendar year ending December 31 preceding, unless the corporation designates the last day of

any other month as the closing of its fiscal year and gives proper notice to the collector. In such case the report will cover the fiscal year so designated and the dates for filing the report and for payment of the tax will be adjusted accordingly. For the purposes of the Excess Profits Tax, all corporations having a net income of $5,000 or more for the taxable year must include in their income tax reports a detailed statement of the actual capital invested.

Although no corporation having a capital stock of the value of $99,000 or less is liable for the Capital Stock Tax, the government regulations require that reports be filed by every corporation having a capital stock of the value of $75,000 and over. The report must be filed in July of each year and covers the preceding twelve months.

Failure or refusal to file either of these reports within the time required by law, or the filing of a false or fraudulent return, renders the corporation liable to a severe penalty and an additional tax to be added to the assessment.

§ 23. (4) Annual Reports

In addition to the tax report, many states require the filing of another report, usually in January of each year or otherwise at some specified time after the annual meeting, giving the names and addresses of the corporate officers and directors, and the location of the principal office in the state. The report is usually simple and is a reasonable requirement, as parties having claims against the corporation or desiring to institute actions against it should have reliable information as to who the officers are and where they can be found.

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§ 24. (5) Reports of Foreign Corporations

The corporation is usually required to make reports in each state in which it does business. These reports are in most states similar to those of domestic corporations.

Part II—Pre-Incorporation Considerations

CHAPTER III

SUBSCRIPTION LISTS AND CONTRACTS

§ 25. General

In former days the subscription list was regarded as a necessary preliminary to incorporation. It was circulated to determine whether sufficient support could be obtained to justify the proposed incorporation, or, if this were already known, to commit the subscribers definitely before the organization was actually undertaken.

In the present day the application of the corporate form has been extended and somewhat modified, and the procedure attendant upon organization has changed correspondingly. Now the corporation is usually organized first, property of some kind is taken over, and stock is then sold or subscriptions solicited to raise any needed capital. Under this plan the subscription list is of much less prominence and importance than formerly.

There are, however, still many cases of incorporation in which the preliminary subscription is employed and is, at times, essential. The farmers of a neighborhood may wish to establish a creamery or a fruit-evaporating plant; in some growing town the citizens may wish to combine their efforts for the construction of an electric plant, the organization of a bank, the opening of a library, or the establishment of some local industry. In such event, the subscription list is circulated

as the first step toward the formation of the contemplated corporation. Also in other cases, memoranda or agreements, which are the equivalent of the subscription list, are entered into between the parties interested, and these are the preliminary and definite steps towards the intended corporate organization. (See Chapter LXIV, "Forms of Subscription Lists.")

§ 26. Nature of the Subscription Contract

Prior to the organization of the corporation, the ordinary subscription is merely a continuing proposition from the subscriber to the proposed corporation for the purchase of a specified amount of stock. At this stage the subscription is not a complete and enforceable contract because the other party thereto—the proposed corporation—has no legal existence, and, until the corporation is formed, the death, insanity, or voluntary withdrawal of the subscriber would cancel the proposition and thereby terminate the proposed contract.[1]

After the corporation is organized and, by either express or implied acceptance of the subscriptions to its stock, has completed the contract, the subscription list becomes a binding agreement between the parties thereto, and the corporation may, if necessary, bring suit for specific enforcement.[2]

To avoid this possibility of revocation which is characteristic of the ordinary subscription list before its acceptance by the corporation, subscriptions are frequently made payable to trustees, who act for the corporation in the matter, undertaking its organization, and where desirable the collection of the subscriptions in whole or in part. Under such a contract properly drawn, the subscriptions, if unconditional, are binding

[1] Hudson R. E. Co. v. Tower, 156 Mass. 82 (1892); s. c., 161 Mass. 101 (1894); Planters, etc., Packet Co. v. Webb, 156 Ala. 551 (1908); Vermilion Sugar Co. v. Vallee, 134 La. 661 (1914); Wright Bros. v. Merchants & Planters Packet Co., 104 Miss. 507 (1913).

[2] 10 Cyc., pp. 388, 389, 394, n. 57; 1 Cook on Corp., §§ 71, 72, 75; Nebraska Chicory Co. v. Lednicky, 113 N. W. Rep. (Neb.) 245 (1907); Snodgrass v. Zander & Co., 106 Ark. 462 (1913).

as soon as made; if conditional, as soon as the conditions are fulfilled.[3]

The acceptance of a valid subscription by the corporation not only renders the contract a binding one but also, of itself, constitutes the subscriber a stockholder of the corporation. If his subscription is made to a trustee for the corporation, he becomes a stockholder as soon as the corporation is organized and his subscription turned in by the trustee. In either case nothing further is necessary to establish him legally in this position nor in the enjoyment of his rights as a stockholder. The delivery of the stock certificates, while a formal recognition of this status, confers nothing that he did not have before, being simply a convenient evidence of his stock interest. "These cases in one court in which the subscriber to capital stock has been treated as a stockholder are cases in which the contract between him and the corporation showed that he was a stockholder having complied with the terms of his subscription and all that was required upon his behalf was a certificate evidencing the same."[4] Even though the subscriber never pays his subscription, he is a stockholder from the time of the acceptance of his subscription until such time as by proper procedure his subscription is cancelled or forfeited for non-compliance with its conditions.[5]

On the other hand, it is to be noted that the corporation when organized is under no compulsion to accept or recognize the ordinary subscription to its stock. The subscriber is not bound; neither is the corporation until the contract is completed as to both parties by the acceptance of the subscription by the corporation.[6] If the subscription is made to a trustee for the corporation and is accepted by him, this would make a

[3] West v. Crawford, 80 Cal. 19 (1889); Richelieu Hotel Co. v. Encampment Co., 140 Ill. 248 (1892); Horseshoe Pier, etc., Co. v. Sibley, 157 Cal. 442 (1910).
[4] Kruse v. Brewing Co., 79 N. J. Eq. 392 (1911).
[5] 2 Clark & Marshall, §§ 366, 378b, and cases cited; Beals v. Buffalo Construction Co., 49 App. Div. (N. Y.) 589 (1900).
[6] Starrett v. Rockland Ins. Co., 65 Me. 374 (1876); Hudson R. R. Co. v. Tower, 161 Mass. 10 (1894); s. c., 156 Mass. 82 (1892); Mill Co. v. Felt, 87 Me. 234 (1895).

binding contract between the subscriber and the trustee, but would not bind the corporation until its acceptance of the subscription, express or implied. If the corporation accepted the benefit of the trustee's act, it would thereby also accept the trustee's contracts, from which such benefits accrued. The very fact of the organization of the corporation by the trustee, or trustees, might be held to be an acceptance of the subscription contracts which rendered such incorporation possible.

Usually, however, the acceptance of subscriptions by the corporation does not enter into consideration, such acceptance following its organization as a matter of course. Litigation may be necessary to compel payment of subscriptions, but not usually to compel their acceptance by the corporation.

In New York, contrary to the weight of authority elsewhere, the courts do not treat an original subscription to stock in a corporation thereafter to be formed as a continuing offer, but hold that, to be enforceable, it must contain all of the elements of a valid contract at the time it is made. Consequently they will not enforce a simple subscription for stock in a corporation thereafter to be formed, but lay down the rule that, to be enforceable, such subscription must amount to an agreement between two or more parties to form the corporation and to take stock therein, and that only after its formation by such parties, or by some one authorized to act for them in this regard, can the subscription to stock be enforced by the corporation when formed.[7]

Subscriptions made as part of a prescribed statutory form of incorporation are irrevocable as soon as made.[8] This applies to a certificate of incorporation wherein the parties executing it appear as subscribers to designated shares of stock. It also applies to subscriptions made on books or lists opened by com-

[7] Avon Springs Sanatarium v. Weed, 189 N. Y. 557 (1907); Sanders v. Burnaby, 166 App. Div. (N. Y.) 274 (1915).

[8] 2 Clark & Marshall on Corp., § 451e; 1 Machen on Corp., § 242; Dupee v. Horse Shoe Co., 117 Fed. 40 (1902); Stevens v. Episcopal Church History Co., 140 App. Div. (N. Y.) 570 (1910).

missioners where this is part of a prescribed statutory form of incorporation.

It has been held in some cases that where a statutory form has been prescribed for taking subscriptions, those taken in any other form are not binding.[9] This does not seem reasonable, and there is good authority for the contrary view.[10]

After the completion of any subscription agreement by the proper action of both parties thereto, it becomes a simple contract and subject to the usual laws of contracts.

The subscription to stock must be distinguished from an agreement to purchase stock.[11] In the first instance the subscriber becomes a stockholder immediately upon the acceptance of his subscription by the corporation. In the latter case he does not become a stockholder until the consummation of his agreement and the delivery to him of his certificates of stock. A subscription list might be so worded as to be merely an agreement to purchase stock, in which case the subscribers would not be stockholders until they received their certificates of stock. (See § 27.)

§ 27. Form of Subscription Contract

Generally, the form of the subscription list is of small importance if the intent of the parties is clearly expressed. Except for the difficulty of proof, a verbal subscription, if within the provisions of the statute of frauds, would be binding and entirely sufficient.[12]

As a matter of ordinary precaution, however, the subscription list should be prepared with due regard to form and with a clear presentation of all important details. The name of the proposed corporation, its general purpose, its capitalization,

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[9] Poughkeepsie, etc., Co. v. Griffin, 24 N. Y. 150 (1861); Shelby Co. Ry. Co. v. Crow, 137 Mo. App. 461 (1909). See Meachem on Corp., § 200.

[10] 10 Cyc., p. 392, n. 42; Planters, etc., Co. v. Webb, 144 Ala. 666 (1905); Buffalo & Jamestown R. R. Co. v. Gifford, 87 N. Y. 294 (1882).

[11] Morawetz on Corp., § 61; 2 Clark & Marshall, § 382; Wood Harvester Co. v. Jefferson, 71 Minn. 367 (1898); Palais du Costume v. Beach, 143 S. W. 852 (1912).

[12] 1 Cook on Corp., § 52; Rutenbeck v. Hohn, 143 Iowa 13 (1909); Peninsula Leasing Co. v. Cody, 161 Mich. 604 (1910).

the par value of shares, the state in which it is to be incorporated, and the conditions under which the subscription is made, all should be set forth with precision. Enough should be included to prevent any question as to the nature of the subscription and the conditions under which it was made.

It is entirely possible to draw a subscription paper so loosely that the subscribers cannot be bound when the corporation is formed and attempts to accept their subscriptions. This is so, for instance, when there is nothing in the subscription agreement to connect the corporation formed with the corporation contemplated by the subscription agreement. A subscription agreement should identify the proposed corporation with reasonable clearness, and should either name the person or persons who are to form the corporation, or be in its terms an agreement between the persons signing it to organize such a corporation. In this case the corporation should be organized by the persons named. If A, B, and C sign a mere subscription to a corporation to be formed, and afterward E, F, and G, who are not mentioned in the subscription paper organize such a corporation, there is no necessary connection between the parties, and the newly organized corporation cannot by merely accepting the subscriptions of A, B, and C bind them.[13]

In Massachusetts, Maine, and New Hampshire the subscription contract must contain an express agreement to pay. If such a promise is not contained in the agreement, the only remedy is forfeiture of the subscriber's stock for non-payment.[14]

Where it is inconvenient to go into full details of the corporation and the terms of subscription in the subscription

[13] Woods Motor Vehicle Co. v. Brady, 181 N. Y. 145 (1905); Avon Springs Co. v. Weed, 119 A. D. 560 (1907); rev., 189 N. Y. 557 (1907); Sanders v. Burnaby, 166 App. Div. (N. Y.) 274 (1915).

[14] New Haven Horse Nail Co. v. Linden Spring Co., 142 Mass. 349, 354 (1886); Belfast, etc., Railroad Co. v. Cottrell, 66 Maine 185 (1876); White Mts. Railroad v. Eastman, 34 N. H. 124, 147 (1856).

list proper, a general statement or prospectus is frequently prepared and accompanies the list. Where this is done the statements of this prospectus become a part of the representations upon which the subscriptions are secured, and must be lived up to in all essential details if the subscription is to be held.[15]

Any material variation from the statements of the subscription list, such as a change of capital, or purposes, or location, will release the subscribers.[16] For this reason, only those details should be stated explicitly in the subscription list that have been fully decided upon, any undecided points being either omitted, or stated as undecided, or otherwise so covered that no matter how they are finally settled the subscriptions previously secured will not be affected. For instance, if the name of the proposed corporation has not been finally determined, the list may be headed with any suggested name, as "The Arnold Separator Company," while the body of the document states that the subscriptions are made to the stock "of a corporation to be organized under the name of 'The Arnold Separator Company,' or such other name as may be later determined." Or if the capitalization were not definitely settled the subscription list might fix sufficiently elastic limits by the use of such phrases as "not less" or "not to exceed," according to the conditions. Subscribers to such a list could not plead any voidance of their subscriptions no matter what name or what capitalization, within the limits, was eventually selected.

At times individual subscription blanks are sent out instead of a single list. At other times several similar lists are circulated as a matter of convenience. If properly worded to

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[15] Southern Insurance Co. v. Milligan, 154 Ky. 216 (1913); Lehman-Charley v. Bartlett, 135 App. Div. (N. Y.) 674 (1909); affd., 202 N. Y. 524 (1911).

[16] 1 Cook on Corp., § 54; 2 Cook on Corp., § 502; Woods Motor Vehicle Co. v. Brady, 181 N. Y. 145 (1905); Yonkers Gazette Co. v. Taylor, 30 A. D. (N. Y.) 334 (1898); Clarksburg Board of Trade v. Davis, 86 S. E. (W. Va.) 929 (1915); Midland City Hotel Co. v. Gibson, 11 Ga. App. 829 (1912).

show their common purpose, these separate lists will for all legal purposes be held as a single list.

The subscription list should be clearly and unmistakably a subscription and not an agreement to subscribe in the future or to purchase stock later. As a general rule the courts construe subscription agreements very liberally in accordance with what appears to be the intent of the parties, but a direct statement that "We, the undersigned, *hereby agree to subscribe,* etc.," instead of the proper form, "We, the undersigned, *hereby subscribe,* etc.," might have a very different legal effect from that intended.[17] An agreement beginning "We, the undersigned, severally promise and agree to and with each other that we will associate ourselves into a corporation, etc." was held good in Massachusetts.[18]

It is to be noted that under the common law, unless otherwise specified in the agreement of subscription, the entire capital stock of the proposed corporation must be subscribed before any of the subscriptions are binding and enforceable.[19] In some of the states this has been modified by statute, but unless this has been done the rule prevails, and, where it is desirable that subscriptions for a less amount than the entire capital stock shall hold, the subscription list should so specify. It is competent for the subscription list to fix this amount at any desired figure and the subscriptions will be binding, provided the other requisite conditions are fulfilled, so soon as the specified amount is secured.

Any person competent to contract may make a binding subscription for stock. A subscriber for stock need not necessarily be an incorporator of the company, though usually, as a matter of statutory requirement, an incorporator must be a subscriber to the company's stock. One corporation cannot

[17] General Electric Co. v. Wightman, 3 App. Div. (N. Y.) 118 (1896); Palais du Costume Co. v. Beach, 143 S. W. 852 (1912).
[18] Athol Music Hall Co. v. Carey, 116 Mass. 471 (1875).
[19] 1 Cook on Corp., §§ 176-181; Converse v. Gardner Governor Co., 174 Fed. 30 (1909); Myers v. Sturgis, 123 App. Div. (N. Y.) 470 (1908).

usually subscribe for the stock of another corporation, though it might be permissible in the case of a corporation authorized to hold the stock of other corporations.

§ 28. Underwriting Agreements

In the organization of the larger corporations, and more especially those designed to effect industrial combinations, it is usually very important and at times absolutely essential that funds be raised in advance of the time when the corporate securities can be offered for sale, or that there be some positive assurance that the necessary funds will be derived from the sale of these securities when they are ready to be offered. Under such conditions the use of the ordinary subscription agreement would, at the best, be ineffective and in most cases absolutely impracticable. Recourse is then had to the modified form of subscription agreement known as the underwriting agreement. (See § 419.)

CHAPTER IV

CONTRACTS PRIOR TO INCORPORATION

§ 29. Status of Corporation upon Organization

When a corporation comes into existence it is usually without debts, contracts, or obligations of any kind, save those expressed in its charter and in the statute law of the state of domicile. It is not bound by anything done or said before its incorporation unless embodied in its charter. A corporation cannot be bound before it exists, as no one could then act with authority as its agent or representative.[1] (See § 34.)

After its organization, the corporation may recognize or accept any proffered contracts it sees fit, and this applies to contracts made on its account before its incorporation. Its acceptance of such a contract may be expressed or implied. If the corporation takes the benefit of the contract, it is liable thereon without any express recognition or formal acceptance.[2] For example, if offices had been leased for the corporation before its incorporation and the corporation, when organized, occupied the offices, it would be liable on the contract without further acceptance. If the corporation did not occupy the offices but by a proper resolution recognized the contract and assumed the rent, it would be liable. If it neither occupied the offices nor assumed the lease, there would be no acceptance either express or implied and the corporation could not be held. The whole matter rests in its discretion.[3]

In Massachusetts and in Missouri the courts hold that a

[1] See 3 Cook on Corp., § 707; Oakes v. Water Co., 143 N. Y. 430 (1894); Federal etc., Co. v. Loeb, 147 App. Div. (N. Y.) 737 (1911).

[2] Robins v. Ry. Co., 100 Me. 496 (1905); *In re* Ballou, 215 Fed. 810 (1914).

[3] Bond v. Atlantic Terra Cotta Co., 137 A. D. (N. Y.) 671 (1910); Sheator Tel. Co. v. Tel. Co., 217 Ill. 577 (1905); Whitney v. Wyman, 101 U. S. 392 (1879); Martin v. Remington-Martin Co., 95 A. D. (N. Y.) 18 (1904).

corporation cannot, by adoption or otherwise, ratify a contract made when it was not in existence by one who assumed to act as its agent. It may, if its directors see fit, make a new contract on the same terms, but this is a new contract and must be complete as a contract in itself.[4] A contract made prior to the incorporation might amount to an offer to the corporation which it could accept.[5]

§ 30. Status of Contracting Parties

Contracts are continually entered into by incorporators, promoters, or trustees for and on account of unorganized corporations. These contracts are entered into on behalf of the corporation and in its interests, but the party who enters into any such contract is himself liable in the absence of an express agreement to the contrary until the assumption of the contract by the corporation.[6] Then, if it was understood that he was acting in the interests of the corporation, the party directly contracting is relieved of liability, the corporation taking over the liability in his stead. If, however, there were no such understanding the party who originally made the contract would be responsible, even after the contract was taken over by the corporation.[7]

For example, if offices are leased for the use of a corporation about to be formed, with the clear understanding that the party making the lease is acting for the unorganized corporation, such party is personally liable and, if the corporation fails to assume the lease, can be held for the full amount, but so soon as the contract is assumed by the new corporation he is released. If, however, the lease were taken without a clear understanding that the party was acting for the cor-

[4] Pennell v. Lothrop, 191 Mass. 357 (1906); Whiting & Sons Co. v. Barton, 204 Mass. 169 (1910); Van Noy v. Insurance Co., 168 Mo. App. 287 (1913).
[5] Holyoke Env. Co. v. U. S. Envelope Co., 182 Mass. 171 (1902).
[6] 1 Machen on Corp., § 358, *et seq.*
[7] Case Mfg. Co. v. Soxman, 138 U. S. 431-437 (1891); Bradshaw v. Jones, 152 S. W. (Tex.) 695 (1912); Strause v. Richmond Woodworking Co., 109 Va. 724 (1909).

poration, he would not be relieved by the mere fact that the corporation took over the lease, but would still be liable and, should the corporation fail to pay its rent, might be called upon to make good the deficiency.

For this reason, in making contracts for the benefit of an unorganized corporation, the fact that they are being made for such proposed corporation should be clearly recognized and expressed. The parties making such contracts should also recognize their own liability in the matter, and, if there is any uncertainty as to the ultimate organization of the corporation or its acceptance of the contracts, should make them dependent upon the organization of the corporation and its acceptance of the contracts, or otherwise be prepared to assume the responsibility themselves.[8]

§ 31. Agreements Among Incorporators

There is another class of agreements relating to the unorganized corporation of a very different nature. These are the understandings or agreements among the incorporators or other interested parties which define the nature of the proposed corporation, its purposes, and often the details of its organization and management. Among the parties these agreements are perfectly proper and legitimate, but they affect the corporation only so far as they are incorporated in its charter or by-laws when these are drawn.

It is to be borne in mind that provisions may be incorporated in the charter or made part of the by-laws in pursuance of a contract or as a consideration for a contract, in such wise that their subsequent alteration or repeal can be effected only by consent of the interested parties. One partner may agree to the incorporation of the partnership business on condition that certain provisions be embodied in the by-laws, the maintenance and observance of such provisions con-

[8] 1 Machen on Corp., § 361.

stituting part of the consideration for the transfer of the partnership property. Such by-law provisions, properly incorporated and duly adopted, cannot be revoked without the consent of all parties concerned.[9] No by-law can be repealed so as to violate or impair a vested right.[10]

Often agreements in regard to incorporation are mere verbal understandings. Usually, if not carried out, these only result in the refusal of the aggrieved party to move further in the matter, such agreements not ordinarily furnishing sufficient basis for litigation.

Even formal agreements between promoters as to the subject matter of a charter can rarely be specifically enforced, and the only recourse of the aggrieved party is a refusal to participate in the subsequent organization of the corporation, or, if damages can be shown, to bring a suit against the offending parties for their breach of contract.[11]

§ 32. Promoters' Contracts

The general doctrine that no one is authorized to contract for a corporation before it is formed applies to all contracts with and by promoters. The promoter is himself liable on these precorporate contracts, unless otherwise expressly provided, but the corporation is not.[12]

For example, as is frequently the case, the promoters of an enterprise may agree with an attorney for its incorporation, authorizing him to attend to the whole matter, including disbursements, preparation of seal, printing, etc.; the amount of his professional fee being agreed upon in advance. On the organization of the corporation, its directors might, if they saw fit, disclaim the whole matter and the attorney would

[9] Kent v. Quicksilver, etc., Co., 78 N. Y. 159; Lowenthal v. Rubber, etc., Co., 52 N. J. Eq. 440.
[10] Wright v. Knights of the Maccabees, 196 N. Y. 391 (1909).
[11] Machen on Corp., § 410; Rudiger v. Coleman, 112 A. D. (N. Y.) 279 (1906).
[12] Bank v. Church Federation, 129 Iowa 268 (1906); Munson v. Syracuse, etc., R. R. Co. 103 N. Y. 59 (1886); Bond v. Atlantic Terra Cotta Co. 137 N. Y. App. Div. 671 (1910).

have neither recourse nor claim against the corporation on account of his contract with the promoters. The corporation having utilized his legal services in its incorporation would probably be held for a fair fee, and for the necessary disbursements, such as the state fee, notarial charges, filing fees, etc. But such claims would have to be based on their own merits, not on the terms of the agreement made with the promoters. That agreement would have no standing as against the corporation, and should this latter reject the seal, printing, etc., the attorney would have no ground to proceed against the corporation therefor, but must look to the promoters.[13]

The most difficult question arising under contracts with promoters relates to the sale of property to the corporation. It is a matter of almost daily occurrence for promoters to dispose of property to corporations organized by them for the express purpose of taking over such property. This somewhat complicated subject is discussed in detail in a later chapter. (See Chapter LIV, "Concerning Promoters," also §§ 238, 246, 434.)

§ 33. Option Contracts

In the formation of corporations, and especially in the formation of combinations, it is frequently necessary that options be secured in advance of the actual incorporation. As these options may be, and often are, absolutely essential to the enterprise, they must be secured before the corporation is formed and frequently involve very considerable expenditures of money.

Notwithstanding the importance of these contracts and their peculiar nature, they fall under the general rules governing precorporate contracts. If accepted, they become the contract of the corporation; if rejected, the corporation cannot

[13] *Re* Empress Engineering Co., L. R. 16, Ch. D., 125 (1881); Weatherford Ry. Co. v. Granger, 86 Texas 350 (1894); Taussig v. St. Louis, etc., Ry. 166 Mo. 28 (1901); Bank v. Eckels, 191 Pa. 372 (1899).

be held. If the corporation refuses to take over any such option contracts, the party obtaining or holding them would have no claim for compensation or for damages on account of any payments made by him thereon or in connection therewith. He might have some claim against his associates if they made any promises to him in regard to the options or authorized him to procure them, but the corporation could not be involved except by its voluntary consent. (See Chapter LXIX, "Option Agreements.")

§ 34. Trustees' Contracts

When the organization of a corporation is contemplated, not infrequently a trustee, or trustees, will be selected to act for the inchoate corporation. Some arrangement of the kind is necessary where subscriptions to the stock of the corporation are to be made binding before its organization. Also it is usually advisable to have definite parties in charge of the matter who have power to act for the subscribers and who will attend to the details of the incorporation.

Such trustees frequently collect payments on subscriptions, make disbursements in the interest of the new enterprise, and in some cases actually carry on the undertaking until such time as the corporation may be advantageously organized and put in control of the going concern.

No matter how far such trustees may have carried the corporate affairs nor to what extent they may have contracted in the interests of the corporation, they have the same individual liability on these contracts and the same inability to force them on the corporation, as in the case of any other precorporate contracts.

The coign of vantage occupied by the trustees is found in the fact that they are in control of the organization, and where, on behalf of the corporation, contracts of any impor-

tance have been entered into, or disbursements have been made, or obligations have been incurred by them, they will see that these are properly assumed by the corporation before its control passes from their hands. Then, if these contracts have been entered into in proper form so that the assumption by the corporation releases the trustees, these latter, barring fraud, are thereafter absolutely free from any liability on account of their precorporate undertakings. (See § 30.)

§ 35. Effect of Failure to Incorporate

When contracts are entered into in expectation of the formation of a corporation and on its behalf, the trustees' status if the corporation fails of incorporation depends upon the nature and condition of the contract. A subscription to its stock, no matter how irrevocable, would be terminated; if payments had been made thereon to a trustee, any unexpended amount might be reclaimed; and if the trustee were to blame for the failure to incorporate, he might be responsible for the portion expended as well. Other contracts, if clearly made on behalf of the proposed corporation, would in most cases be terminated. If not clearly so made, the parties acting for the corporation might be held to specific performance or for damages for non-performance. If the contracts were made with the distinct understanding that they were for the benefit of the proposed corporation, the parties acting for the unorganized corporation could not insist on performance for their own benefit.

Subscribers may under some circumstances be held liable as partners for expenses incurred if the attempted incorporation is not effected. Thus where a projected incorporation failed the court said: "Under the facts disclosed in this case, the corporation had no existence; there was simply an immatured intention of the parties to form a corporation . . . . there being no responsible principal, the associated

parties must be held liable as partners."[14] In Illinois, Mississippi, and some other states the statutes provide that the incorporator shall be held personally liable where the incorporation is incomplete.[15]

[14] Furniture, etc., Co. v. Crawford, 127 Mo. 356 (1894); Meyer v. Brunson, 88 S. E. (S. C.) 359 (1916); Bank v. Sheldon, 86 Kan. 460 (1912).
[15] Ragland v. Doolittle, 100 Miss. 498 (1911); Richardson Fueling Co. v. Seymour, 235 Ill. 319 (1908).

CHAPTER V

WHERE TO INCORPORATE

§ 36. General

If the corporation laws and taxes were uniform in every state of the Union, or if the whole matter were regulated by general federal laws, the best location for any particular corporation could easily be determined. It would then, as a matter of course, be organized in that state in which the principal operations were to be carried on or in which its headquarters might most conveniently be located.

There is, however, great variation in the cost of incorporation in different states, also in the rates and methods of taxation after incorporation. The general requirements and regulations imposed on corporate operations also differ widely.

Owing to the material differences in the costs, regulations, and requirements of the several state laws, taken in connection with the fact that a corporation organized in one state may, under the restrictions imposed on foreign corporations by other states, do business in these states, the selection of the place of incorporation frequently becomes a balancing of the comparative advantages and disadvantages of the available states. The low taxes of one state will be weighed against the better corporation laws of another; the liabilities incurred in a convenient state with the freedom therefrom in another less convenient state; the benefit of incorporation under desirable laws in an "outside" state and consequent burdens in the "operating" state, as against direct incorporation in this latter; or the privileges allowed by one state as against the immunities enjoyed under the laws of another.

§ 37. Domestic Incorporation

Within the boundaries of the state by which it is chartered a corporation is a domestic corporation; outside these boundaries it is a foreign corporation. Within its own state a corporation has certain recognized powers and privileges as a matter of right; outside it has only such powers and rights as may be accorded foreign corporations by the laws or customs of the particular state. These regulations as to foreign corporations vary greatly in the different states. In some, foreign corporations are discriminated against, while in others, upon compliance with the prescribed formalities foreign corporations have the same status as domestic corporations.

As a rule a corporation should be organized in that state in which its principal operations are to be carried on, and this rule should not be departed from unless to gain some distinct advantage. At times, however, there may be weighty reasons for incorporating in an outside state. Also it often happens that the business of a corporation must be conducted in a number of different states, in which case it is domiciled in one state and thereafter transacts its business in the others as a foreign corporation. The selection of the home state then becomes purely a question of expediency. (See §§ 143, 144.)

§ 38. Foreign Incorporation

A corporation is not a citizen of the United States and has no claims to the privileges and immunities of citizenship under the Constitution.[1] It is an artificial creation of the state in which it is incorporated, and in that state is endowed by common and statute law with certain rights, powers, and immunities. It is also usually allowed to carry on its operations in other states, with all the powers and privileges it enjoys in its home state.[2] These other states may, however, if

[1] Paul v. Virginia, 8 Wall. 168 (1868).
[2] Dodge v. City, 57 Iowa 560 (1881); Tootle v. Singer, 118 Iowa 533, 536 (1902); Lancaster v. Amsterdam Improvement Co., 140 N. Y. 576 (1894).

they so desire, ignore the fictitious personality of the foreign corporation, refuse it recognition, debar it from initiating litigation in the state courts, consider it a partnership if litigation be brought against it, or even entirely prohibit its corporate operations within the state except in so far as they may be permitted by the constitutional provisions regulating interstate commerce.[3]

Generally, however, no such discrimination is exercised against the foreign corporation. In most, if not all the states, laws will be found providing for certain fees and other requirements as a prerequisite to the exercise of the corporate rights by foreign corporations within the state, but upon compliance with these demands they are admitted freely and are usually accorded all the rights and privileges of domestic corporations.

Some states have even favored "the stranger within the gates," as in New York, where for many years domestic corporations were subjected to high fees, burdensome reports, and possible liabilities, which were not imposed upon foreign corporations doing business within the state. As a consequence the citizens of New York when desirous of incorporating a local business or enterprise would resort to other states for the purpose, and the corporation so organized would thereafter do business in New York as a foreign corporation, and this though all the parties interested resided in the state and all the corporate business was transacted there.

This practice gave rise to litigation to determine the right of citizens to incorporate elsewhere when the corporate business was to be conducted in the state, but the decisions were uniformly and unreservedly in favor of such right.[4] In other states the same question has arisen and has been so

[3] 2 Morawetz on Corp., § 965a; Ducat v. Chicago, 10 Wall. 410 (1870); Pembina Mining Co. v. Pa., 125 U. S. 181 (1888); Pensacola Tel. Co. v. W. U. Tel Co., 96 U. S. 1 (1877).

[4] Merrick v. Van Santvoord, 34 N. Y. 207 (1866); Demarest v. Flack, 128 N. Y. 205 (1891); Lancaster v. A. I. Co., 140 N. Y. 576 (1894).

uniformly decided in the same way that the principle may be regarded as firmly established.[5]

In some states conditions of so onerous a nature exist as to render foreign incorporations most desirable, as for instance the double liability of Minnesota, which is imposed upon the stockholders of certain corporations when organized under the laws of the state. Under ordinary conditions the stockholders of a foreign corporation doing business in the state escape this double liability altogether, being subject only to such liabilities as are imposed by the corporation laws of the state of organization.[6]

In this connection it is to be noted that the State of California, in which a special liability is imposed upon stockholders of domestic corporations, has sought to extend this same liability by statute provision to the stockholders of foreign corporations doing business within the state. This liability has been sustained in two decrees of the Supreme Court of the United States, in one instance as against the California stockholders of a Colorado corporation doing business in California, and in the second case as against a New York stockholder of an Arizona corporation doing business in California. In the first case, however, the corporation was organized in Colorado, mainly by citizens of California, for the express purpose of doing business in California, and this purpose, with unusual and perhaps unnecessary frankness, was specifically set forth in the charter.[7]

In the second case the charter recited that the corporation was formed to carry on business in Arizona and California, and the defendant prior to the incorporation had signed a writing reciting the intent of the subscribers to form a cor-

[5] People v. Fidelity Co., 153 Ill. 25 (1894); Haskins v. Kelly, 77 Kans. 155 (1908); Saltmarsh v. Spaulding, 147 Mass. 224 (1888); Newburg Petroleum Co. v. Weare, 27 O. St. 343 (1875).

[6] Bank v. Hall, 35 O. St. 158 (1878); Canada Southern R. Co. v. Gebhard, 109 U. S. 527 (1883); Risdon I. & L. Works v. Furness, (1906) 1 K. B. 49.

[7] Pinney v. Nelson, 183 U. S. 144 (1901).

poration in Arizona for the purpose of acquiring land in California and locating a hotel thereon. While not questioning the principle that the corporation could not without authority from the stockholder make him answerable in a way not contemplated by the charter, the court in the latter case held that, on the facts, the stockholder had assented to the doing of business in California and was therefore bound.[8]

It may be stated as a general rule that if corporate business of any importance is to be carried on in a foreign state all the requirements of that state in regard to foreign corporations should be complied with as a matter of business policy and expediency. In some states severe fines are imposed on corporations doing business without a license, though the usual penalty is the refusal of corporate recognition by the foreign state. The corporation may, however, still carry on business within such foreign state, its property is safe from confiscation, and it cannot be prevented from bringing suit in all proper cases in the United States courts in that state. Beyond this, however, it has no status. It cannot enforce a contract or collect a debt in the state courts. Where, however, as in Michigan, Missouri, and several other states, the statutes declare all contracts made by unauthorized foreign corporations to be void, no action is maintainable upon such contracts even in the federal courts.[9] In Florida it has been held that, if sued, an unauthorized foreign corporation may be treated as a partnership and its stockholders be considered as partners.[10]

In addition to the restrictions and penalties imposed upon unauthorized corporations, as corporations, many states make the officers and agents acting for the corporation within the state liable to heavy penalties, and five of the western states

[8] Thomas v. Matthiessen, 232 U. S. 221 (1914).
[9] Despres, Bridges & Noel v. Zierleyn, 163 Mich. 399 (1910); Parke Davis & Co., v. Muller, 245 Mo. 168 (1912).
[10] Taylor v. Branham, 35 Fla. 297 (1895).

make the officers and agents of the corporation jointly and severally liable in any and all contracts of such corporation made within the state during the time that the corporation was in default.

§ 39. Cheap Incorporation

Resort to outside incorporation on account of its cheapness is legitimate but not always wise. The cheap states have their advantages, but the excellence of their corporate regulations does not figure among these. Nor is the status of their incorporations as a class entirely desirable for reputable organizations.

Occasions will occur when temporary or experimental incorporations are desirable, or where the conditions are such that the cheapest incorporation must be made to serve, or where the laxity of corporate regulation is regarded as advantageous. Then the cheap location will be sought.

Speaking generally, however, the ease and cheapness with which incorporation may be secured in these localities draw to them the unsubstantial enterprises, illusive undertakings, and fraudulent schemes that so frequently adopt the corporate guise for their dubious careers. These, flocking to the cheaper states, give bad repute to their incorporations, and the very fact of organization in one of these states is a circumstance requiring explanation and tending to prejudice the experienced investor. In other words, the corporation is in bad company and is likely to suffer the usual results of such association.

An even more material objection to the states of cheap incorporation is found in the fact that their corporation laws are crude, incomplete, and for the most part unadjudicated. Nor is there any reasonable assurance of the permanency of the existing laws. Obviously they have been compiled hastily and without requisite care and consideration,

and they are liable to be amended or altered at any time with equal haste and lack of judgment. The possibilities in this direction are illustrated by the corporate career of West Virginia. Prior to 1901, West Virginia had a virtual monopoly of the cheap incorporation business. Its rates were low and its requirements simple. Incorporations flowed to it in a steady stream and its revenue therefrom was large and very profitable. In 1901, however, without previous warning and without obvious reasons beyond an ill-judged avarice, the state legislature raised the corporate fees and taxes materially and made them complicated as well as burdensome. The result was the practical destruction of the incorporating business in West Virginia. Most of the outside corporations already in the state re-incorporated elsewhere, new incorporations ceased to come, and West Virginia is no longer considered an available resort for incorporators from other states.

§ 40. Reputation of Different States

Each of the incorporating states has a general reputation in corporate matters. This primarily arises from the character and operation of its corporate legislation and from the security afforded thereby to corporate investors and creditors, but is directly derived from the character of the corporations organized under its laws.

This reputation is of much importance to corporations intending to offer their securities to intelligent investors. In the cheaper localities, on account of this cheapness and the accompanying laxity of the corporate laws, such reputation is distinctly bad. The mere fact that a corporation is organized in Arizona or South Dakota is sufficient to put experienced investors on their guard and renders the sale of corporate securities difficult.

Among the more moderate-priced incorporating states Maine stands well and is resorted to by many eastern corpo-

rations. Delaware has a fair reputation and, with its moderate organization fees and annual taxes, is a popular state for outside incorporations. Connecticut's reputation is good, but is not widely known.

New Jersey was at one time the most popular state in the Union for outside incorporations of large capitalization, but in 1913 the legislature passed certain laws affecting corporations known as the "Seven Sisters" Acts, which prohibited holding corporations, and otherwise made restrictions which greatly hampered New Jersey's business of incorporation. New Jersey felt the change severely and has recently restored to good standing the holding corporation and the subsidiary company. These are now lawful provided their effect is not to "substantially lessen competition," or to "restrain trade," or to "create a monopoly." Massachusetts stands high, on account of the conservatism of her laws. Pennsylvania is greatly handicapped by the complications of her corporation laws, but stands well, as do also Illinois and other important states lying between. New York, under its present corporation laws, rank high.

§ 41. Liabilities Imposed in Different States

When the selection of a state for incorporation is under consideration the special liabilities attaching to directors and stockholders of a corporation are matters for careful investigation. The unusual stock liabilities found in Minnesota and California are very serious, if not insuperable, objections to incorporation in these states. In the cheap localities the usual liability on unpaid stock exists, but there are no special liabilities of either directors or stockholders.

In the more important incorporating states stockholders generally have no liabilities save on unpaid stock, though in Massachusetts, New York, and a few other states there is a stockholders' liability to laborers employed by the corporation.

Also in Idaho, Minnesota, and some other states failure to observe certain requirements as to corporate organization and procedure may involve stockholders in liability; and in a number of states the legislatures have re-enacted the common law liability of stockholders—which exists in all states—for dividends or other disbursements to the stockholders which impair the capital stock.

In most of the states directors are held liable only for negligence or direct fraud.

§ 42. Protection of Minority in Different States

The protection of minority interests is at times of very great importance. It could hardly be satisfactorily secured in any state where special charter provisions are not permitted, though in some states where such provisions are not allowed, the right to cumulative voting is effectually secured by the constitution or the statutes of the state, and the minority is to that extent protected. In Delaware, New Jersey, and New York protection may be secured by charter provisions. In Maine it may be had only by by-law enactment, which, as the by-laws are subject to repeal by the majority, is practically no protection. (See Chapter LV, "Protection of Minority.")

§ 43. General Rules for Selection of State

Usually the selection of the place of incorporation will be determined by the particular conditions. The more important of the few general rules that can be given are as follows:

1. A corporation having but one plant or place of business, in which all or the greater part of its capital is involved, should be incorporated in the state where that plant or place of business is located.

2. Any large corporation, or industrial combination, formed to transact business or operate plants in a number of

states will, for the reasons already given, find incorporation in Delaware advantageous while Maine also is favored for incorporations of this kind.

3. Temporary incorporations, some few close corporations, purely speculative corporations, incorporations of doubtful stability, and all other corporations desiring the maximum of capitalization with the minimum of expense and restriction, will naturally gravitate to the bargain-counter localities where the cost of incorporation is nominal.

CHAPTER VI

COST OF INCORPORATION

§ 44. General.

The direct expenses of incorporation are the initial organization taxes paid the state authorities, the incidental fees for filing and acknowledgments, fees paid to counsel, and the cost of the corporate equipment. Thereafter the expenses are presumably the same as for an unincorporated concern, save for the annual franchise tax and possibly an increased property taxation that may result from the greater difficulty of evasion under the corporate form.

The incidental fees are usually trifling. The initial state fees and the subsequent annual taxation are more serious. As, however, these differ greatly in the various states, only a general consideration of the subject can be undertaken here.

§ 45. Organization Fees and Annual Taxes

In deciding upon a locality for incorporation the matter of fees and taxes should not be given undue importance. In many cases really important advantages are sacrificed for the sake of immaterial savings in fees. Unless the saving is considerable, it is rarely expedient to incorporate in a foreign state for this reason alone. The following tables give the states most utilized for general incorporation purposes.

It is to be noted that all such tables of comparative expenses are misleading without some explanation. For instance, the annual taxes of the preceding table are based on the supposition that in each case the entire stock of the corporation is issued and outstanding. Also the annual taxes as given

Comparative Table of Organization Expenses

Including Taxes and All Filing and Incidental Fees

Capital Stock of Company	New Jersey	New York	Delaware	Maine	South Dakota
$1,000	$35.00	$40.00	$25.00	$27.00	$13.00
5,000	35.00	40.00	25.00	27.00	13.00
10,000	35.00	40.00	25.00	27.00	13.00
25,000	35.00	42.50	25.00	67.00	13.00
50,000	35.00	55.00	25.00	67.00	18.00
100,000	35.00	80.00	25.00	67.00	18.00
500,000	110.00	280.00	65.00	67.00	23.00
1,000,000	210.00	530.00	115.00	117.00	33.00
5,000,000	1,010.00	2,530.00	365.00	517.00	113.00
10,000,000	2,010.00	5,030.00	615.00	1,017.00	153.00

Comparative Table of Annual Franchise Taxes

$1,000	$1.00	$1.50	$5.00	$5.00	None
5,000	5.00	7.50	5.00	5.00	"
10,000	10.00	15.00	5.00	5.00	"
25,000	25.00	37.50	5.00	5.00	"
50,000	50.00	75.00	10.00	5.00	"
100,000	100.00	150.00	10.00	10.00	"
500,000	500.00	750.00	25.00	50.00	"
1,000,000	1,000.00	1,500.00	50.00	75.00	"
5,000,000	4,000.00	7,500.00	150.00	275.00	"
10,000,000	4,250.00	15,000.00	275.00	525.00	"

are exclusive of the usual tax imposed on any real or personal property held in the state, which is taxed in all respects as if owned by an individual. In New York the annual tax varies with the conditions, and, as given in the table, is based on the supposition that (1) all the capital is issued, (2) is used in the state, and (3) is paying 6 per cent dividends.[1]

In the table as given the usual incidental expenses of each state have been included as part of the organization tax. These incidental fees vary. In New York they amount

[1] Since this was written New York has imposed on mercantile and manufacturing corporations a 3 per cent income tax in lieu of the tax as given.

approximately to $15; in New Jersey $10; in Delaware $15; in Maine $17; in South Dakota $3. In Arizona these fees would amount to from $20 to $30.

The comparative cost of incorporation comes up for consideration only when foreign incorporation is contemplated. In all such cases the cost of keeping up a state office and agent in the selected state is to be added to the usual expenses. This would vary from $25 to $50 annually for corporations of moderate capitalization, and usually includes assistance in holding annual meetings in the state and such attention to state reports as is demanded by the local law.

It is to be noted that the annual franchise tax in New Jersey amounts to a very considerable sum. In New York a corporation doing all its business outside of the state and merely maintaining an office in the state for its books and meetings, pays no annual franchise tax. The annual franchise tax in Maine and in Delaware is moderate. In the District of Columbia, Illinois, North and South Dakota, and some other of the western states there is no annual franchise taxation. Connecticut and Wisconsin have no franchise tax but have an income tax which applies to the income of corporations. In considering the question of cost, it is to be remembered that foreign corporations are usually required to pay license fees and taxes in the states in which they do business, and often foreign incorporation merely adds the cost of the outside incorporation to the taxes that cannot be avoided in the state in which the corporation conducts its operations. In some cases, however, a foreign incorporation may save onerous local taxation, as in the case of People, etc. v. Feitner, 54 App. Div. (N. Y.) 217 (1906), where debts due the company from parties outside the state were held taxable in the state, as was also personal property generally regardless of its situs. Here foreign incorporation would have saved the corporation over $30,000 per annum.

§ 46. Avoiding Fees and Taxation

As stated elsewhere, it is usually advisable for an incorporation to be taken out in that state where the principal business is to be conducted. At times, however, the incorporating fees are so excessive that the corporation is forced to resort to another state where the fees are less onerous, doing business in its own state thereafter as a foreign corporation. For instance, had the Steel Trust incorporated in Pennsylvania, which would naturally have been its home state, its initial fees would have amounted to over $3,500,000. In the state selected, New Jersey, these fees amounted to but $220,000.

Incorporation in a less expensive state is the most obvious method of avoiding excessive state fees, where practicable. Conditions may exist, however, which fix the state of incorporation despite the question of fees, and, where the fees are high, the details of incorporation should then be so adjusted as to reduce these fees and the annual taxation thereafter to the lowest possible figure.

Where a corporation is organized to take over a business or property, it is often possible and frequently distinctly advantageous to issue bonds in part payment for the property taken over. The necessary capital stock of the company is thereby reduced by just the amount of this bond issue, and the state fees and the state taxation thereafter are also proportionately less. Also, in many states the corporation, in rendering its statement of taxable property, is allowed to deduct any outstanding indebtedness. The bond issue is an entirely legitimate indebtedness and in these states may be deducted from the taxable property of the corporation in ascertaining the basis of taxation. This law was sustained by the decision in People, etc. v. Barker, 139 N. Y. 55 (1894), an extreme case, where the corporation under consideration had an outstanding bond issue of $2,250,000, an amount far in excess

of its total capital stock, and at least twice the amount of its actual assets. In this decision the court said (at p. 63):

"This indebtedness must in the nature of things be taken into consideration in arriving at the value of the capital of the relator. And when it is seen that the indebtedness of a corporation is double the amount of all its assets, it follows, upon the system adopted by the State for the assessment of corporations that the actual value of the capital of such a corporation is zero."

In some states a corporation is taxed on personal property in the place where its principal place of business is located, and this place of business is fixed by its charter. This obtains in the state of New York. Accordingly, the Union Steamboat Company, operating principally in Buffalo, New York, where it employed twenty steam propellers and conducted a profitable business, selected by charter designation an obscure little hamlet in the southern part of the state as its principal place of business. Here taxation was low and assessors lenient and the company made good the statement of its charter by renting a room, putting up its sign thereon, and holding its annual meeting therein.

This went on without objection for some six years, when the Buffalo assessors woke to the fact that the city was not receiving its apparent dues, and thereupon promptly assessed the corporation on some $600,000 of personal property. The company paid the tax under protest and then brought suit to recover the amount so paid. Judgment was in favor of the corporation and on appeal to the highest court was sustained. The court in its decision[2] stated that if the scheme was a device to avoid taxation the evil must be corrected by other authorities, not by the courts.

It was to be supposed that the legislature would, in accordance with the suggestion of the court, have promptly remedied

[2] Union Steamboat Co. v. City of Buffalo, 82 N. Y. 351 (1880).

this defect in the corporation laws, but, although it is now more than twenty-five years since this case was decided, nothing has been done, and many New York corporations have since utilized this legal method of evading taxation.[3]

A more intricate method of avoiding taxation sometimes followed is the organization of a company with the desired name, purposes, and capitalization in some state where taxation is moderate, as Delaware, Maine, South Dakota, or Arizona. Stock is issued for property in apportionment of interests and for other purposes as necessary. This is the actual corporation. A small operating company is then incorporated in the state in which the business is really to be conducted, with the same name and purposes, but with a nominal capitalization, possibly only 1 per cent of that of the larger corporation. The smaller corporation then acts as the local agent of the larger corporation, under such arrangement as the particular conditions indicate, the larger corporation not appearing actively in the conduct of the business.

If the small corporation is to have an entirely independent existence, with officers and stockholders distinct from those of the larger company, it is usually arranged that it shall make no profits, all these being diverted to the larger corporation. If this separate existence is not necessary, the stock of the smaller corporation is held either by the larger corporation or by the stockholders of the larger corporation in due proportion. The officers of the smaller corporation are then usually the same as for the larger corporation, and the relations between the two are very close.

It is obvious that organization fees and taxes are by this device largely avoided, and that both state and local taxation thereafter are materially lessened if not almost entirely evaded. The general plan is, however, difficult and

[3] With most New York corporations the new 3 per cent income tax will make this form of evasion impracticable.

complicated and requires the assistance of able counsel for its proper execution.

In some states taxes are arranged upon a sliding scale, depending upon the rate of dividends paid. Where this is true, close corporations not infrequently reduce their dividends by the disposal of profits as salaries, instead of allowing them to accumulate and be distributed as dividends.

In many states manufacturing corporations are either entirely released from the payment of state franchise taxes or are granted a more liberal basis or rate. Such exemption would naturally be claimed as far as possible.

The whole system of taxation is unsatisfactory and inequitable. Many corporations make false returns, shift cash accounts, manufacture fictitious indebtedness, and resort to other expedients of doubtful legality or morality in order to relieve the burden of taxation. Such methods are, of course, impossible where even ordinary ethics of honor and honesty prevail. Indeed, the methods of avoiding taxation heretofore outlined, and such others along the same lines as the statutes of the various states may allow, are not free from criticism. They are legal, but are evasions of the spirit of the law. If, however, a legislature in its wisdom has decreed that a corporation organized with both stocks and bonds shall have these latter deducted from the former in order to establish its taxable status, or that an obscure village where taxes are light may be selected by a wealthy city corporation as its principal office for taxation, there would seem no valid business reason why corporations should not take advantage of the situation while it lasts and avoid all taxation that may be escaped without fraud and subornation of perjury. The same thing may also be said of incorporating in an outside state where taxation is less and doing business at home as a foreign corporation. It is not a manifestation of the highest spirit of civic patriotism, but otherwise it is not to be condemned.

§ 47. Counsel Fees

The corporation is a creature of the law and in its formation every requirement of the law must be observed. It is not sufficient that the corporation be merely brought into existence. With the aid of a printed charter form, and a ready-made set of by-laws, even the inexperienced may do this. It must be incorporated under the proper forms, with proper adjustment of detail, and with such knowledge of the conditions and possibilities that it secures every legitimate advantage allowed or permissible under the laws which authorize its creation. For this reason lawyers, and the inevitable concomitant, lawyers' fees, are important features of any incorporation in which actual values are involved.

Where cheap incorporations are imperative, or where the character of the incorporation does not justify the employment of an attorney, the incorporating agencies are usually employed at a cost of from $25 to $50, and the incorporation is secured in one of the cheaper incorporating states. Usually it is not worth more than it costs.

For the better class of incorporations, where a really sound and effective organization is desired, the fees of any qualified attorney would hardly be less than $50, and from this would range far upward according to the complexity of the arrangements, the standing and experience of the counsel, and the increase of responsibility as property values increase.

It is to be noted that an incorporation differs from the conduct of litigation in the fact that the amount of work and responsibility involved may be estimated in advance with reasonable accuracy. For this reason the proper counsel fees may be determined with precision and are usually agreed upon before incorporation is undertaken.

In determining the fees the reputation of the counsel employed frequently plays an important part. The known skill, experience, and standing which make up the reputation

of an eminent attorney not only insure the validity and the working value of the incorporation, but may, and frequently do, assist materially in the subsequent sale of corporate securities and in the general welfare of the corporation. It is obvious that if the incorporating counsel ranks high, his name in connection with the corporation is not only a guarantee of its technical correctness, but of the propriety of its purposes, the solidity of its undertaking, and, generally, of the status and character of the whole enterprise.

§ 48. Corporate Equipment

The cost of the stock books, certificates, seal, etc., necessary or usually employed in connection with a corporation varies widely according to the nature of the outfit. The ordinary corporation of moderate capitalization and pretensions, desirous of restricting its expenditures, may secure everything necessary in neat and attractive shape for the modest sum of $10 or even less. This includes stock certificates, printed on lithographed blanks, the corporate seal, minute book, stock book, and transfer book.

If a handsomer outfit is required, with special lithographed designs for certificates, and more costly bindings for books, the price of the oufit will easily run up to $40 or $50 and more. If specially engraved certificates are requisite or desired, this price will be increased to anywhere from $100 to $500, according to designs, character, etc. If bonds are to be included in any of these outfits the cost will be doubled or trebled, according to the quality of the work and material Loose-leaf minute books range in price from $3 to $15 according to style and size.

The corporate books of account need be no different either in kind or cost from those used by an unincorporated concern.

Part III—The Stock System

CHAPTER VII

THE CAPITALIZATION

§ 49. Capital

The "capital" of a corporation is the total amount of its assets of all kinds in excess of liabilities, up to the amount of the outstanding capital stock; assets over and above that amount constitute "surplus."[1]

The "capital stock" of a corporation is the amount of stock it is authorized by its charter to issue. This is the usual significance of the term, though when used in the statutory law its meaning has been restricted to the amount actually paid in by the stockholders.[2]

The "capitalization" of a corporation includes not only its shares of capital stock issued but any bond issues or debentures that may be outstanding. These are termed generally "corporate securities."

§ 50. Basis of Capitalization

In the earlier history of business corporations, the capital stock of any particular company was usually determined by the amount of actual cash and property deemed necessary for the corporate purposes, or was restricted to an amount equal to the cash subscriptions which could be secured for

[1] Williams v. Western Union Tel. Co., 93 N. Y. 162 (1883); Equitable Life Assurance Society v. Union Pacific R. R. Co., 162 App. Div. (N. Y.) 81 (1914).
[2] State v. Fire Association, 23 N. J. L. 195 (1851); Burrall v. Railroad Company, 75 N. Y. 211 (1878); People v. Morgan, 178 N. Y. 433 (1904).

its exploitation. In either case the capitalization was intended to represent the actual cash or property values originally put into the corporate enterprise.

At the present time the theory of capitalization has been somewhat modified and extended, and even in conservative operations, at least a portion of the earning value is usually included in the original capitalization.

The general theory is simple. Any enterprise may be considered as worth the amount upon which, with due regard to sinking fund and maintenance requirements, it can pay fair dividends and it may therefore justly be capitalized at that figure. In other words, the earning capacity of the enterprise rather than the cash value of the property involved forms the modern basis of capitalization.

As stated by a writer of eminence in financial matters in a discussion of this practice:

"It is not good financing to capitalize a company at only the value of its tangible assets—as if any sum over that value was 'water.' A manufacturer who does not on the average earn considerably more than the usual rate of interest upon the actual cost of his plant might better go out of business and invest his money in bond and mortgage. Business men consider themselves entitled to at least 12½ per cent upon their actual capital. If, then, assuming high earnings when forming a combination, a banking house should issue preferred and common stock in amounts each equal to the value of the plant, it would not be stock watering. The difference between cost of plant and earning capacity, whether we call it value of patents and trade-marks or good-will, is just as legitimate an asset of a company as is its merchandise, though harder to appraise properly."[3]

If fairly done and kept within reasonable bounds, this general basis of capitalization is hardly open to serious objec-

[3] Thomas L. Greene.

tion. On the contrary, in many cases there are substantial business reasons for its adoption. If the enterprise be capitalized on the basis of its immediate cash or cost value, it may, and should, if meritorious, pay dividends far above the regular rates of interest or the usual returns on invested funds, and this fact inevitably attracts attention, provokes opposition, and invites competition.

Also stock in a dividend-paying concern may usually be sold at a better price on a large capitalization, if this latter be justified by the dividend paid, than it possibly could on a more conservative valuation.

For instance, if an enterprise were capitalized at, say, $200,000, on which it could earn and pay a regular annual dividend of 6 per cent, its stock should sell readily at par, or 100. If its capitalization were reduced one-half, to $100,000, so that its regular annual dividend became 12 per cent, the stock, having twice the earning power and representing the same corporate property, should theoretically sell at twice par, or 200. As a matter of fact it would do nothing of the kind, ordinarily bringing from 175 to 180 according to circumstances and showing the "cashing" value of the smaller capitalization to be from 10 to 12½ per cent less than that of the larger. That is, the smaller capitalization would involve a loss on the sale of the entire capital stock of from $20,000 to $25,000. As long as this is true, enterprises will be capitalized on their earning capacity rather than on their actual immediate property value. This is treated more fully in § 53.

Also, if capital is to be raised for a newly organized corporation, the larger capitalization, if within reasonable limits, gives much the better basis for the "bargain counter" offerings so frequently necessary in the sale of stock. Greater inducements, at least in appearance, may be offered the buyer, and, as suggested in the preceding paragraph, from the

standpoint of future transactions the position of the buyer himself is better.

For these and other reasons the general practice at the present time, even in conservative circles, is to capitalize at that amount upon which the enterprise or undertaking may be reasonably expected to pay fair dividends—that is, the earning capacity is made the basis of capitalization. The practice is often deprecated and may be easily carried so far under exaggerated estimates of earning as to become dangerous and at times dishonest. Kept within reasonable bounds, however, it would not seem to be objectionable either from the standpoint of morals or sound finance and it does give certain legitimate advantages.

§ 51. Capitalization at Less than Real Values

In many cases the owners of small businesses in which but a few people are interested and to which others are not to be admitted, find it advantageous to incorporate at a capitalization much below the real value of the concern. Other conditions also arise in which the corporation with capitalization below its real value is a convenient business mechanism. The arrangement is advisable in all those cases where merely an apportionment of interest is desired under the corporate form. The fees and taxes are thereby kept at the minimum, the attention of competitors is not attracted, the organization itself may be made very simple, and every purpose of the incorporation is effectively fulfilled.

In states where a tax is levied on the capital stock, such tax may be largely and legitimately avoided by a small capitalization.[4]

In those small and close corporations where profits

[4] Since the above was written the operation of the excess profits tax has made it undesirable to incorporate at anything less than the actual tangible values. Where a large income is anticipated, the highest possible capitalization may be advantageous.

threaten to become excessive as compared with the capitalization, the dividend rate is sometimes kept down by the distribution of surplus profits under the guise of salaries. It need hardly be said that the plan can only be adopted with justice and safety when all the stockholders participate in due proportion in these salary distributions. If fairly carried out the practice is legitimate.

§ 52. Capitalization at Real Values

In banks and other financial institutions the capital stock is fixed at the amount deemed necessary for the purposes of the business, and this capital stock is sold at par. In those states where a double liability attaches to the stock of financial institutions, the more solid of these require their subscribers to pay into surplus an amount equal to their subscriptions, or, in other words, the subscription price is placed at double the par value of the stock in order to cover this liability in advance. At the same time they thereby establish a reserve equal in amount to their capitalization.

In most mercantile businesses it is usual to approximate the real value of the enterprise in the capitalization. Such valuation may, it is true, include good-will, trade-names, and the other more or less intangible assets of the business that differentiate the going concern from a mere stock of goods. In any established business it is obvious that these values are quite as actual as any of the more material properties and are quite as properly included in the capitalization. Their inclusion, however, does amount for all practical purposes to a capitalization on earning power.

§ 53. Capitalization on Earning Capacity

This is the rule in capitalizing corporate combinations and public utilities. Usually bonds or preferred stock, or both, are issued to the extent of the real values; then com-

mon stock is issued to such amount as the estimated earning capacity will carry after payment of the dividends and interest on preferred stock and bonds.

The overwhelming volume of watered stock emanating from public utility and industrial organizations and combinations is attributable to the excessively optimistic and misleading estimates of earning capacity made by promoters. If the earning capacity of these incorporations were actually equal to the burdens imposed upon them, the large issues of stock would from some points of view be fully justified, but in most cases of this kind the dividends, if they come, are uncertain and irregular or entirely inadequate.

Referring to these issues of watered stock, a work on the subject says:

"Common stock is a feature of every financial plan. When no public flotation is expected, the amount of common stock is a matter of no consequence. It usually represents the controlling interest, and is sometimes placed at a nominal figure. In public flotations, however, common stock is usually issued to capitalize anticipated earnings. It is supposed to represent the future profits of the property. The industrial trusts, for example, issued preferred stock for the values of the separate companies before consolidation. The common stock was supposed to express the economies and profits accomplished by the consolidation, as well as those arising out of the natural growth of the business. Common stock is usually sold at a low figure, liberal representations concerning anticipated earnings being made to influence its purchase. These representations are not often realized."[5]

In determining the capitalization of speculative corporations organized to exploit mines, inventions, and other uncertain undertakings, an even more liberal spirit prevails, the promoters estimating future earning powers on the basis of

[5] "Corporation Finance," by Edward S. Meade.

expectations. In some few cases such enterprises succeed, the capitalized anticipations are realized, and dividends are paid up to the promoter's brightest hopes. These few and exceptional instances then become an alleged justification for the overcapitalization of all similar undertakings.

No safe rules can be formulated for the capitalization of these uncertain enterprises. Usually their stock must be sold at a tremendous discount from face value. This calls for a proportionately large overcapitalization to which it is not usual to apply the ordinary principles of business. *Caveat emptor*—let the buyer beware.

§ 54. Capitalization of Good-Will

In the incorporation of any going concern or of any combination or reorganization of going concerns, good-will is an asset of much importance and is, as a matter of course, included among the other assets to be capitalized. This practice is entirely legitimate as the good-will stands for the difference between the real value of a live business and the property value of the stock, equipments, and other items which make up its implements of trade. As a matter of fact, the good-will is not infrequently the most valuable asset of the concern, even where other assets are of considerable worth.

On account of the intangible nature of good-will, its correct appraisement is often a matter of very considerable difficulty. Its value varies with local conditions and is at best almost entirely a matter of business judgment. Because of this difficulty of accurate valuation, good-will is a favorite device for inflating purposes and frequently affords a basis for unjustifiable stock watering.

In the ordinary mercantile incorporation, good-will is often included without specific recognition. A lump sum is put upon the business as a whole and the corporation is capitalized at the figure so obtained. At other times a separation is

effected between the property assets and good-will. Where this is done common stock is frequently issued to the appraised value of the good-will, while the cash and accounts, stock, machinery, realty, and other property assets are provided for by an issue of preferred stock, the two issues making up the total capitalization of the corporation.

In this case the preferred stock represents the tangible assets, and its preference dividend is in the nature of a high interest on the actual value of this property. In the event of the dissolution or liquidation of the corporation, this preferred stock is frequently paid out or redeemed before the common stock receives anything. (See Chapter IX, "Preferred Stock.")

The common stock, on the other hand, representing the intangible assets—the good-will and earning capacity of the business—receives no dividend of any kind until all other obligations have been paid and then only out of surplus profits.

§ 55. Form of Capitalization

After deciding upon the capitalization of an enterprise, a further question arises as to the form of this capitalization. The simplest plan is to have only common stock, but at times there are material advantages in the use of preferred stock.

Preferred stock occupies a position between common stock and the bond. It is a safer form of investment than common stock, but it carries no rights of foreclosure. It takes precedence of common stock as to payment of dividends and frequently as to its ultimate redemption, but its dividend is not payable unless earned. Its dividend is fixed and it does not as a rule participate in excess profits, but its rate is usually much higher than the interest rate of a bond. Where preferred stock can be used to raise money it is regarded as a much more satisfactory means than an issue of bonds. (See Chapter IX, "Preferred Stock.")

§ 56. Bond Issues

Where a corporation has real property or invests in property having a tangible value, it is often of advantage to issue bonds in place of some portion of the stock capitalization. An enterprise requiring $150,000 in actual value might, instead of capitalizing for that amount, incorporate for but $100,000 and then issue bonds for the additional $50,000.

The interest to be paid on these bonds would be less than the dividends a prosperous business would pay upon the same amount of stock, and the difference represents a profit for the stock actually issued. Against this is the fact that the interest must be paid whether profits justify it or not, as also the further fact that if interest is not paid foreclosure proceedings will probably bring the corporation to an untimely termination or to a reorganization. In this latter case the proceedings are usually disastrous and most of the assets are likely to be absorbed in settling the claims of the bondholders. Because of this the issuing of bonds is not safe unless the corporation is sound and of reasonably quick earning powers. If there is any doubt on these points, preferred stock, the security next to bonds in safety and desirability, is the more prudent method of raising money. (See Chapter LI, "Bonds.")

§ 57. Capitalization as Affected by Financial Exigencies

If an enterprise is speculative in its character and the owners expect direct profits from its financing, or if promotion payments are added to the load under which the new corporation is expected to stagger to success, the conditions do not tend to conservative capitalization. In such cases the immediate financial necessities take precedence of almost everything else and the capitalization is shaped to that end. Profits for owners and promoters, bonus stock, commissions, advertising, and the general expenses of financing are included until finally the actual business necessities of the corporation rep-

resent but a fraction of the total capitalization, and the final arrangement at times comes dangerously close to being a fraud upon the investing public.

It is unfortunate that the capitalization of a corporation should be influenced by considerations such as these. At times, however, an enterprise will be of such a purely speculative nature that, with all honesty of purpose, it would be impossible to finance it on any conservative basis. Concessions to the necessities of the situation are then imperative, divergencies from the ideal corporate arrangements cannot be avoided, and the best that can be done is to reduce them to the minimum. In such cases the real interests of the corporation—which are the successful inauguration and prosecution of its business and the production of profits for its stockholders—should be kept closely in view and only such concessions made as are absolutely essential to successful financing.

CHAPTER VIII

STOCK

§ 58. Capital Stock

The capital stock of a corporation is the maximum amount of stock it may issue under the provisions of its charter. This may bear some direct relation to the actual property values or "capital" possessed by the corporation—from which it is to be absolutely distinguished—or may be far above or below this real capital. (See § 62.) The stock capitalization may be based on the actual cash value of the corporate property, or on the amount required for the development of the undertaking, or on the earning power of the corporate business, or on the speculative basis of what these earning powers may be when the business is developed, or on some combination of these factors.

The capital stock of a corporation is fixed by its charter and can usually be increased or diminished only by amendment of that instrument. In some few states, however, as in West Virginia, charters are issued empowering the corporation itself, within certain limits, to determine the amount of its capital stock.

The capital stock of a corporation may be issued in part or in whole and its total authorized amount bears no necessary relation to the amount of stock sold, subscribed, or outstanding. For instance, a corporation with a capital stock of $100,000 might have issued one-half of this amount, the remainder being reserved for subsequent use. The outstanding stock is then $50,000, but its capital stock is $100,000 and remains at this amount until changed by amendment of the charter or other statutory method.

In this connection it should be noted that formerly, when the common law controlled, a corporation was required to have its entire capital stock subscribed before beginning business. Until this was done it could not enforce the subscriptions to its stock.[1] Now, however, in most states the stringency of this rule has by statutory enactments been greatly relaxed. Some minimum amount, fixed by statute and usually much smaller than the total stock capitalization, may be designated by the charter as the amount with which the corporation will begin business, and so soon as this amount has been subscribed the corporation can enforce subscriptions to its stock and may begin its operations. In a few states a further proportion of the capital stock must be paid in within a specified time, as in New York where a corporation must have at least one-half its total capital stock paid up within one year from the date of incorporation.[2]

§ 59. Shares

For the sake of accuracy and convenience in representing the interests of the various stockholders in the capitalization and in the corporate enterprise and property behind it, capital stock is divided into shares which are almost invariably of equal face value, and together make up the whole stock capitalization.[3] In the absence of statutory restriction there seems no reason why a corporation may not issue common and preferred stock of different par values. In New York a provision in the corporate charter for such an arrangement would probably be upheld.[4] In California, however, such

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[1] See 1 Cook on Corp., §§ 176-181.—

[2] This law is largely a dead letter, as no one is charged with its enforcement and no penalty is imposed for failure to comply with its provisions.

[3] In England there is a distinction made between stock and shares. "Stock is distinguishable from shares by being divided into, and transferable in, odd and varying amounts, ranging from tens of thousands down to a penny in some cases. . . . Its distinguishing feature, which divides it from shares and bonds, is this fact that it can be split up into any odd amount." "Stocks and Shares," by Harley Withers.

[4] See White on Corporations (8th Ed.), p. 442.

a provision has been held invalid on the ground that it is in contravention of the statute declaring that no distinction shall be made between classes of stock as to voting power.[5]

Unless restricted by statute, shares may be of any desired face value, though the greater portion of the issued stock of this country is in the form of $100 shares. Mining stocks are often issued in shares of the face value of $1, this being done with a view to more impressive offerings and to the reception of smaller subscriptions than could well be taken with larger shares. In any enterprise to be financed by popular subscription, a small share value is considered good policy, $10 being a figure frequently selected. Where the holders of stock are few in number and it is desired to render the sale or other disposition of the stock difficult, or other reasons make such course advisable, the face value of the shares—where not prohibited by statute—is sometimes placed at $500 or more. The shares of the Carnegie Company were $1,000 each, but the United States Steel Corporation placed its shares at $100 in order to facilitate their sale to the investing public. Unless there is some valid reason to the contrary, the generally recognized share value of $100 is to be preferred and selected.

An interesting innovation in share values is the share of unspecified value, that is, a share without any named par value, such share merely representing a fractional interest in the profits and assets of the corporate enterprise. It is argued that such shares, lacking the "price ticket" of a nominal value, will force the investing public to investigate the real value of the enterprise and the real probability of profits, and thus determine the real value of the shares much more surely and quickly than under the present system of valued shares.

After agitation on the subject covering some years, the New York legislature, in 1912, passed a law providing for the issuance of unvalued shares of this nature. In 1915, 168 cor-

[5] Film Producers Inc. v. Jordan, 154 Pac. (Cal.) 605 (1916).

porations were organized in New York with shares having no par value. Maryland, Delaware and Maine have passed similar laws. It is still too early to predict whether the device will prove of very great usefulness, but it is probable that similar provisions will be incorporated in the statutes of other states. A summary of the esssential features of the New York legislation follows:[6]

(Sec. 19.) Upon formation or reorganization, any business corporation may provide for the issuance of unvalued shares (other than preferred shares) without any nominal or par value, by stating:

1. The number of shares that may be issued, and, if any stock is preferred, the preferences, with the amount, character and par value of such preferred stock, which shall be $5 or some multiple of $5 up to but not exceeding $100.

2. The amount of capital which it will use in conducting its business. This must be not less than $500 and not less than the par value of the preferred stock, plus $5 or some multiple of $5 for every share of other (unvalued) stock.

Each share of unvalued stock must be equal and each certificate shall have written or printed thereon the number of unvalued shares represented by it, and the entire number of such shares authorized.

The corporation may sell such unvalued shares, for such consideration as may be prescribed (1) in the charter; or (2) at their fair market value, the judgment of the board of directors as to such fair market value being conclusive in the absence of fraud; or (3) the price may be fixed by consent of two-thirds of each class of shares voting at a duly assembled stockholders' meeting.

All unvalued stock so issued shall be deemed full-paid and non-assessable.

[6] Stock Corporation Law (Consol. Laws, Ch. 59), as amended by Ch. 351, Laws of 1912, §§ 19-21, and Laws of 1917, Ch. 500.

(Sec. 20.) Such corporation shall not begin business or incur debt until the amount of capital stated in the charter shall have been paid in money or property at actual value. Violation of this prohibition makes directors assenting personally liable.

(Sec. 21.) The organization tax on such corporations shall be five cents on each share of unvalued stock. The stamp transfer tax shall be two cents on each share.

The use of the unvalued share is, of course, optional, the law merely giving the right to organize under its provisions if desired.

If a corporation were organized under the unvalued share law, say with 800 shares, each share would represent a one eight-hundredth interest in the corporate property and business, and its dollars and cents value could be told only by determining the value of the corporate property and business, and dividing this value by 800. Thus, if the estimated values owned by the corporation amounted to $42,400, each share would, in the absence of other modifying conditions, be worth $53.

As a matter of fact, this would be equally true with the same number of shares of a specified par value. It is obvious that, if 800 shares of stock are issued by a corporation, the value of each share is exactly the same whether its par value be $10, $100, or nothing at all. No matter what its face or par value may be, it represents merely its due fractional interest in the corporate business and property. When, however, a money value is placed upon a share, there is an irresistible tendency to consider it as worth this value, or at least to consider this value as a basis upon which to establish the true value, and it is to escape from this tendency that the unvalued share has been devised. Whether it will make for any juster or more accurate estimates of share values, experience only can show.

§ 60. Certificates of Stock

A certificate of stock is merely a convenient evidence of the ownership of corporate shares, and its loss or destruction does not affect such ownership in any way. The loss of the certificate may embarrass the stockholder on occasion, just as the loss of a deed to real estate or bill of sale to other property might be embarrassing, but he can still collect his dividends, attend and vote at stockholders' meetings, and generally perform his functions as a stockholder just as he did before the loss of his certificate. If he wishes to sell or otherwise transfer his interest in the corporation, his certificate would probably have to be replaced before the purchaser or transferee would consent to take over the stock. Usually the corporate by-laws provide for the issue of a new certificate in case of loss or destruction of one already issued. The matter is, however, troublesome at the best, generally necessitating the giving of a bond or other guarantee to the corporation, and the loss of certificates is to be avoided if possible. (See § 181.)

It is to be noted that the certificate of stock is purely a matter of form and convenience, that the ownership of stock may and frequently does exist before any certificates are issued, and that it would be entirely possible to conduct a corporation—with the consent of its stockholders—without the issue of certificates at all, the stock books of the corporation then being the sole evidence of stock ownership.

While this is true, stockholders are entitled to certificates evidencing the stock owned by them and can force the issue of such certificates if withheld. This right must, however, be exercised within proper limits. Stockholders are not thereby authorized to make nuisances of themselves and harass the secretary by unreasonable exactions such as excessive transfers, or demands for large numbers of small certificates, or for issues of fractional parts of a share. To curb the tendency

in this direction, the secretary is sometimes empowered by the by-laws to charge a small fee for each certificate issued by him. This is legally permissible and is usually sufficient.[7]

At common law, certificates of stock are not negotiable, and if the owner of a certificate of stock loses it or it is stolen from him when indorsed in blank, a subsequent bona fide purchaser of such stock is not protected against the true owner, unless the owner was guilty of negligence.[8] By mercantile custom, however, stock certificates have been largely treated as negotiable instruments, and in a number of states certificates of stock have been made negotiable instruments under a statute generally known as the "Uniform Stock Transfer Act."[9]

§ 61. Unissued Stock

A corporation is empowered by its charter to issue stock up to the full amount of its authorized capital stock. At the time the charter is allowed all this stock is unissued. Thereafter it may be issued, in whole or in part, at the discretion of the corporation or as required by its operations. The unissued stock, no matter whether it be the whole capital stock or only a reserved portion thereof, represents nothing whatever beyond the potential right of issue. It has no intrinsic value. It is merely the right, granted by the state, to issue stock up to the prescribed amount.

This being so, the unissued stock cannot in any way be regarded as an asset of the corporation. If sold it brings in cash, property, or other value that have a greater or less intrinsic worth, but the outgoing stock carries with it an interest in the corporate property that should equal the value received for such stock. The general corporate property has been increased, but the ownership thereof has likewise been increased in the

[7] Giesen v. London & Northwest Mortgage Co., 102 Fed. Rep. 584 (1900).
[8] 1 Cook on Corporations, § 358, Knox v. Eden Musée Co., 148 N. Y. 441 (1896).
[9] These States are New York, Ohio, Pennsylvania, Rhode Island, Wisconsin, Alaska, Louisiana, Maryland, Massachusetts, Michigan, New Jersey.

same proportion. In bookkeeping parlance the increase of assets and liabilities is exactly equal. The unissued stock therefore represents nothing more than the right to admit new members, or stockholders, into the corporation, upon payment of the proper *quid pro quo*. To regard it as an asset would be as illogical as to consider the right to admit new partners in a firm an asset of the partnership. (See § 80.)

§ 62. Issued Stock

Stock is always supposed to be issued at its face or par value for cash or other actual values. At the time of organization, therefore, the face value of the stock issued—if full-paid—would, theoretically, equal the actual value of the corporate assets. Even if this be true in fact, these values may, and generally do, vary widely thereafter. If the corporation is successful, its assets may increase far beyond the nominal value of its issued stock, while if unsuccessful these assets will probably fall far below the total face value of the issued stock. That is, the value of such stocks as shown by the books of the corporation will be far above or below the par value. The selling price may, and, depending largely upon the rate of dividends maintained and the general desirability of the stock, probably will be at a still different figure.

Frequently a corporation, by purchase, gift, or otherwise, regains its issued stock. Such stock coming back into the possession of the corporation is not retired thereby or brought back into the condition of unissued stock, but is designated as treasury stock, may be sold when desirable, and is usually regarded as an asset. (See Chapter XI, "Treasury Stock.")

§ 63. Full-Paid Stock

In the absence of statutory laws to the contrary, stock may be issued on any basis that the directors, with the assent of the stockholders, deem best. That is, it may be issued for

its full face value in money or property, or for only a portion of its face value, or on a promise to pay, or on partial payments, or on no payment at all as a free gift.[10] If, however, it is not paid for at its full face value in money, property, or services—where payment is allowed by services—it is not full-paid stock, and therefore carries a liability to non-assenting stockholders and to creditors of the corporation for the amount still unpaid.[11] (See Chapter X, "Full-Paid Stock.")

The courts have shown a tendency of late years to construe the law more strictly against any dubious, unfair, or inequitable payment of stock when the rights of creditors or stockholders are concerned.[12]

The term "watered stock" is merely a convenient designation for stock issued in excess of the values behind it. (See §§ 76, 77.)

§ 64. Common and Preferred Stock

Preferred stock is that to which some preference has been given over other stock of the same corporation as to participation in profits, and often in assets in case of liquidation. If there is no distinction in regard to these two features the stock of a corporation is all common stock.

Different preferred stocks may be issued by the same corporation in any desired variety of preference as to dividends and redemption or liquidation rights. These are distinguished from each other as first, second, and third preferred stock, or by other designations descriptive of the peculiar status of each stock. The lowest, or non-preferred, stock is common stock.

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[10] 2 Clark & Marshall on Corp., § 390a and cases cited; 1 Cook on Corp., §§ 30, 46, Scovill v. Thayer, 105 U. S. 143 (1881); Goodnow v. Amer. Writing Paper Co., 66 Atl. (N. J.) 607 (1907).

[11] 2 Clark & Marshall on Corp., §§ 397, 401; Camden v. Stuart, 144 U. S. 104 (1892); Merchants' etc., Agency v. Davidson, 23 Cal. App. 274 (1913); but contra, Christensen v. Eno, 106 N. Y. 97 (1887); Southworth v. Morgan, 205 N. Y. 293 (1912).

[12] See v. Heppenheimer, 69 N. J. Eq. 36 (1905); Arnold v. Searing, 73 N. J. Eq. 262 (1907); s. c., 78 Atl. Rep. 762 (1910); Mason v. Carrothers, 105, Me., 392 (1909); Old Dominion Copper Co. v. Bigelow, 188 Mass. 315 (1905); s. c., 203 Mass. 159 (1909); Bigelow v. Old Dominion Copper Co., 74 N. J. Eq. 457 (1908); same facts in Old Dominion Copper Co. v. Lewisohn, 210 U. S. 206 (1908).

§ 65. Other Classifications

As stated, the capital stock of a corporation may be divided into common and preferred stock on the basis of its relation to the corporate profits or property. Stock may also be classified in other ways. Most of these other classifications relate to the voting right. The simplest is a division of the stock into two classes, one class voting, the other not exercising this right. (This classification, however, would not be permitted under the California statute.) For instance, in the incorporation of a partnership where one or more take the active management, others merely supplying the capital, the active partners might have their interests represented by voting stock and the interest of the silent partners represented by non-voting stock. (See Chapter LVI, "Incorporating a Partnership.")

Other classifications are possible in considerable variety, and, generally, it may be said that any desired classification is allowable that is not repugnant to equity, to the common law, or to the statute law of the state under which the corporation is organized. On the other hand, it may be said that unusual classifications, unless clearly demanded by the conditions, are not to be recommended. They may work unexpected hardships, are at times very uncertain in their actions, and introduce undesirable complexities into the corporate mechanism.

Classifications of stock may be authorized either by charter or by-law provisions. As a matter of prudence they should be incorporated in the charter where possible. The specifications relating to any class of stock, except unmodified common stock, should be printed in full on the face of each certificate by which such stock is represented. (See §§ 64, 65, 364, 425.)

CHAPTER IX

PREFERRED STOCK

§ 66. Nature and Use

Preferred stock is that which has some preference as to dividends or assets over other stock of the same corporation. This preference is usually given to make such stock safer or more attractive, though at times its purpose is to limit dividends or gain some other desired end.

The use of preferred stock is general. It is perhaps most commonly employed where money is to be raised for the development or operation of a corporate enterprise. For this purpose it may be made to offer greater safety both as to principal and dividends than common stock, while it does not carry the dangerous foreclosure privilege of the bond.

When a business is incorporated, preferred stock is frequently issued to represent or pay for the actual property assets; the good-will and other intangible assets being represented by an issue of common stock. When a partnership is incorporated, the excess investment of one partner is very often represented or satisfied by an issue of non-voting preferred stock, while the interests of a silent partner may be conveniently cared for by the same means. Where an invention or other property is taken over and payment made in stock, the transferrer, on account of its greater safety, will frequently demand a portion or the whole of his price in preferred stock, and, generally, the device will be found most useful in effecting the adjustments and allowances so frequently necessary in incorporating.

Usually preferred stock is created by charter provision,

the preferences and restrictions being set forth at length. In many states it may be authorized by proper by-law provisions, but it is always better and safer to provide for it in the charter.[1]

After incorporation, unless otherwise provided by statute, the assent of every stockholder is required for the issue of preferred stock. This is reasonable, as the value of the common stock may be depreciated by such an issue. In many states the statutes allow preferred stock to be issued after incorporation when authorized by a prescribed majority of the outstanding stock.[2]

Preferred stock is issued in many different forms and with many different classifications, privileges, and restrictions. The possible range is wide and includes almost any desired attribute not contrary to law or public policy. All the conditions of any particular issue should appear upon the face of the certificate by which such preferred stock is represented. If the specifications are too voluminous for this, the fact that the certificate represents preferred stock should appear plainly on its face, together with a reference to the provisions of the charter by which such stock is authorized. Such notice is sufficient to put any intending purchaser on his guard, and if he purchases the stock he cannot afterward assert ignorance of its conditions as a basis for litigation or claims against the corporation.

Unless specifically prohibited therefrom by proper provision in the charter, by-laws, or other authorization under which such stock is issued, preferred stock carries the right to vote and the right to participate in dividends beyond the preferential dividend after the common stock has received a dividend equal thereto. That is, in any year, if the preferred dividend

[1] 1 Machen on Corp., § 528; 1 Cook on Corp., § 268; Toledo, etc., R. R. v. Trust Co., 95 Fed. 497 (1899); Kent v. Quicksilver Mining Co., 78 N. Y. 159 (1879).

[2] Hinckley v. S. & S. Co., 107 App. Div. (N. Y.) 470 (1905); s. c., 193 N. Y. 599 (1908).

is paid and the common stock has received a dividend equal in amount to this preferential dividend, then any further dividends belong to and must be paid to all the stock, common and preferred alike. (See § 70.) Preferred stock is also entitled to cumulative dividends unless otherwise provided. Preferred stock has no preference over common stock in the distribution of assets in case of liquidation or dissolution, unless such preference is specifically given by statute or set forth in the authorizing provisions.

Preferred stock differs from a bond issue in the very material feature that interest on bonds must be paid when due and can be enforced by a foreclosure suit, while dividends on preferred stock are payable only from net profits and, if profits are not made, are not due and therefore cannot be collected. Also, bonds must be paid on maturity, while preferred stock has no fixed due date. Bondholders are creditors of the company. The holders of preferred stock are not creditors of the company, have no claim against the company except for dividends when declared, and have no rights, save for their preferences, superior to those of the common stockholders.[3] For these reasons the issue of preferred stock is much safer for the ordinary corporation than the issue of bonds. Preferred stock is much favored in the formation of industrial trusts.

Sometimes an attempt is made, in order to interest investors, to issue special forms of securities which shall have for the investor the advantages both of preferred stock and of bonds. So far, all such attempts have been unsuccessful. The courts will not permit the same security to create the two inconsistent relationships of stockholder and secured creditor, Irrespective of what the security may be called, they will look behind the name, determine the essential character of the

[3] 1 Cook on Corp., § 271; Warren v. King, 108 U. S. 389 (1883); St. John v. Erie Ry. Co., 22 Wall. 136 (1874); Field v. Manufacturing Co., 162 Mass. 388 (1894); Ellsworth v. Lyons, 181 Fed. 55 (1910).

security, whether it is that of a bond or of stock, and limit the holder to such rights as lawfully belong to that class of security.

In many states there are statutory provisions relating to preferred stock which must be consulted when the subject is under consideration, these statute laws taking precedence of the general or common law herein set forth. Statutory authorization for the issue of preferred stock is not necessary.[4] The provisions creating preferred stock should be framed with care, for the law reports abound with suits arising from ill-defined preference stock rights.[5]

§ 67. Preference as to Dividends

The following extract gives a common form of charter provision authorizing the issue of a simple preferred stock:

"Of said capital stock, five hundred shares of the par value of fifty thousand dollars shall be preferred stock, entitled to receive from the net earnings of the company an annual dividend of 6 per cent before any dividends are paid upon the common stock."

The holder of a preferred stock, such as provided in the paragraph quoted, would have the same voting right as the holder of common stock; his dividends, although this is not specifically stated in the creating clause, would be cumulative, and he would participate in any general dividends in excess of the preferential dividend already received. In case of liquidation of the corporation he would in most states have no claim to preference on the distribution of assets, but would come in on the same basis as the holder of common stock.

Preference as to dividends may be as to time and amount, as in the creating clause given, or as to profits from certain

[4] Kent v. Quicksilver Mining Co., 78 N. Y. 159 (1879); Roberts v. Robert-Wicks Co., 184 N. Y. 257 (1906); Equitable Life Assurance Society v. Union Pacific R. R. Co., 162 N. Y. App. Div. 81 (1914); Sterling v. Watson Co., 241 Pa. St. 105 (1913); *In re* Fechheimer Fishel Co., 212 Fed. 357 (1914).

[5] 1 Machen on Corp., § 549.

sources, as where a preferred stock is to receive all the profits of a certain plant or a particular branch of the business.

The usual rate of dividend on preferred stock ranges from 5 to 7 per cent, though but few reliable stocks bear this latter rate. In some states the rate is limited by statute to a maximum of 8 per cent.

§ 68. Preference as to Assets

Unless otherwise specifically provided, preferred stock participates in any distribution of assets upon the liquidation of the corporate property just as common stock does, but has no preference.[6] Some preference in this respect is usual, the customary arrangement requiring the payment of the par value of preferred stock with all arrearages of dividends before anything is paid upon the common stock. In some states preferred stock carries this right under the statute law unless otherwise specifically provided by the creating provisions, but even in such states it would be better to incorporate this preference in the charter to prevent any mistake or misapprehension as to the status of the stock.[7]

§ 69. Cumulative Dividends

Preferred stock may be cumulative or non-cumulative. If the former, its dividends are not payable if not earned, but when profits are earned its unpaid dividends, past or present, are a first charge against such profits and must be paid before the common stock receives anything. If preferred stock is non-cumulative, a passed dividend is lost and is not a charge against the company in any way. Usually a non-cumulative preferred stock is not a desirable holding. Its existence is a standing inducement to the improper passing of dividends. The courts sometimes interfere on behalf of

[6] 1 Machen on Corp., § 565; 1 Morawetz on Corp., § 461; 1 Cook on Corp., § 278.
[7] 1 Machen on Corp., § 551; Boardman v. Lake Shore, etc., R. R., 84 N. Y. 157 (1881); Elkins v. Camden, etc., Ry. Co., 36 N. J. Eq. 233 (1882).

the holders of non-cumulative stock where profits have been made and the directors unjustly refuse to pay dividends.

Non-cumulative preferred stock is, as stated, undesirable. It is, in fact, a standing invitation to the directors, unless their ethical standards are high, to administer the corporate finances to the advantage of the common stockholder. Profits that might very properly have been applied to the preferred dividends are diverted into improvements or developments. These redound to the ultimate advantage of the company, but meanwhile stand in the way of the dividends on the non-cumulative preferred stock until the company has reached a point where common and preferred stock dividends are both possible. The preferred stockholder's dividends for this period are absolutely lost so far as he is concerned. The company has profited at his expense. The directors might properly have paid them if they would, but decided in favor of the common stockholder.

If investors were wise there would be no sale for non-cumulative stock, for there is no legal way for the holder of such stock to prevent the directors postponing dividends until the common stockholders can share equally or even receive more than do the holders of preferred stock.

It is to be noted that if the preferential dividend is to be non-cumulative, this fact must be clearly expressed in the charter provisions by which the stock is authorized. Where not so expressed, the courts have held the preferential dividends to be cumulative and payable in full out of the first profits before anything is received by the common stock. The cumulative feature of preferred stock is, however, for the sake of security and definiteness usually covered by express provision.

Preferred stock bearing cumulative dividends is sometimes called "guaranteed stock" but the term is not well applied, being used with greater propriety to describe stock upon which

the dividends are guaranteed by some other corporation. This latter form of stock is a not uncommon expedient in arranging the terms of railroad combinations, and the employment of the term "guaranteed stock" in that connection is the more common as well as the better use.

§ 70. Participation in General Dividends

As already stated, unless otherwise expressly provided, preferred stock participates equally with the common stock in all dividends after both common and preferred have received an equal dividend. That is, if the preferred stock has received its preferential dividend of, say, 6 per cent together with any cumulated arrearages, it participates no further in dividends until 6 per cent has been paid upon the common stock as well, but thereafter both classes of stock stand upon exactly the same basis as to any further dividends declared during that year. If such further participation on the part of the preferred stock is not desired, it must be expressly denied.[8]

Such participation privilege beyond the preferential dividend is not common. It is sometimes employed to advantage in the adjustment of interests among incorporating parties, but is usually found only where the stock must be made attractive above the common, as in a speculative corporation where the risks are extra-hazardous, or under other conditions necessitating unusual inducements to investors.

Sometimes when preferred stock is to be made attractive beyond the ordinary, it is limited to its preferential dividend, but a common stock bonus of equal amount is given with it. This plan is, however, much less advantageous for the other stockholders than the use of participating preferred stock, as it involves (1) the payment of additional dividends on stock equal in amount to the preferred stock, (2) an additional

[8] 1 Machen on Corp., § 555; 1 Cook on Corp., § 269.

voting right in the management, (3) in event of liquidation a double claim against the assets. Further, the receipt of bonus stock may involve the holder in a liability to creditors.[9]

To illustrate, suppose a capitalization to be as follows:

Common stock to original owners	$100,000
Preferred 6 per cent participating stock to purchasers	100,000
Total capitalization	$200,000

If in any year the net profits are $18,000 and are distributed as dividends, the dividend rate will be 9 per cent and the original owners and the holders of the purchased stock will each get $9,000. Also in the absence of restrictions on the preferred stock, the voting power is equally shared, and on dissolution both participate equally in the distribution of assets.

If instead the organization had been as follows:

Common stock to original owners	$100,000
Common stock given as bonus to preferred holders	100,000
Preferred 6 per cent non-participating stock to purchasers	100,000
Total capitalization	$300,000

and the annual net profits distributed in dividends were $18,000 as before, the dividend rate would be 6 per cent for all the stock, and the original owners would get but $6,000 as against $9,000 under the first arrangement. Also the preferred stockholders would, in the absence of voting restrictions on the preferred stock, hold two-thirds of the voting stock and thus control the corporation, and, if the corporation were liquidated, would receive two-thirds of its entire available assets.

[9] Holcombe v. Trenton White City Co., 82 Atl. (N. J.) 618 (1912).

To avoid misunderstanding when a participating preferred stock is issued, a distinct provision in the authorizing charter or by-law clause should cover such participation.

§ 71. Redemption Right

Preferred stock is often issued with the proviso that after a certain period and after specified notice, the corporation shall have the right to buy in or redeem its outstanding preferred stock at some previously designated price.

Provisions in regard to the redemptions of preferred stock are found in the laws of a number of states, for the most part referring to the time and rate of redemption. In the absence of any prohibition, the redemption of preferred stock under suitable conditions would seem to be entirely within the power of the corporation, though a provision of this kind would not be permissible in a state where corporations are forbidden to acquire their own stock.[10] "The relation of classes of stockholders to each other and to the corporation is, unless governed by statute, purely contractual."[11]

It is also to be noted that under no circumstances would the corporation have the right to redeem preferred stock when by so doing it would impair its capital stock or affect the rights of creditors.[12] For this reason such redemption should be made permissive, not mandatory, as, if made mandatory, the corporation might later find itself under contract obligation to do an illegal act.

The redemption right is sometimes of considerable importance, and should be retained if it can be done without injury to the sale of the preferred stock. Dividend rates on preferred stock are usually higher than interest rates on bor-

[10] Hackett v. North Pac. Ry. Co., 36 Misc. (N. Y.) 583 (1901). In this case a foreign corporation was authorized to issue preferred stock by a vote of a majority of stockholders. A condition that the corporation might on the first day of January in any year prior to 1917 retire such preferred stock at par, was held valid.

[11] Equitable Life Assurance Society v. Union Pacific R. R. Co., 162 App. Div. (N. Y.) 81 (1914).

[12] Ellsworth v. Lyons, 181 Fed. 55 (1910).

rowed money, and, if the corporation accumulates surplus profits, the preferred stock may be redeemed and its high preferred dividends terminated with much advantage. If the redemption period is reasonably remote, say five years or more, and the redemption price is attractive, this right may be provided without detriment to the salability of the stock affected.

The redemption price of preferred stock varies with the conditions. Always, as a prerequisite, the payment of any accrued dividends is involved. Frequently the price is fixed at the par value of the stock plus one year's dividend. At other times it is arbitrarily placed at a figure thought attractive or fair, as 105, 110, or even more under some circumstances. Occasionally the holders of the preferred stock will be given the option of exchanging their stock for common stock instead of taking the redemption price.

Preferred stock when redeemed is no longer a claim against the dividends or assets of the company. It is, however, still a part of the capitalization of the company, and might, with the assent of the stockholders, be reissued.

§ 72. Voting Rights

Unless otherwise expressly provided, preferred stockholders have exactly the same right to participate in corporate meetings and to vote upon their stock as do the holders of common stock.[13] Usually, however, this voting right and the right to participate in stockholders' meetings is denied the preferred stock, the power of management being reserved to the common stock. In such case the provisions by which the preferred stock is created should state clearly the fact of its non-voting character, and this fact should also appear plainly upon the face of the certificate by which such preferred stock is represented. Under such circumstances the preferred stockholders

[13] 1 Machen on Corp., § 570.

have no more voice in the management of the corporation than have its bondholders.

Unless prohibited in some way, it is entirely within the power of the corporation to deny the voting power to preferred stock before issuance.

"There is no rule of public policy which forbids a corporation and its stockholders from making any contract they please in regard to restrictions on the voting power. If the agreement is made by unanimous consent it is legal."[14] In California, however, the statutes provide that no preference as to voting power may be granted to any class of stock.[15]

A variation of the plan of absolute non-representation is to provide that the holders of preferred stock shall not vote so long as the preferential dividends are paid with reasonable regularity, but that if such preferential dividends fail, say for two consecutive years, then the holders of preferred stock shall thereafter have the right to vote.

This plan has the appearance of equity. If those in charge of the corporation cannot manage the corporate business so as to pay dividends on even the preferred stock, it would seem but reasonable that the holders of preferred stock, who suffer by this mismanagement, should be allowed a voice in its control. If interest is not paid on a bond issue, foreclosure results and the bondholders not infrequently buy in and conduct the business. Giving the preferred stock a conditional voice in the management is a far milder application of the same principle.

§ 73. Convertible Stock

In New Jersey by statutory enactment, corporations answering to certain descriptive conditions are allowed to redeem their preferred stock—the holders consenting—with

[14] 2 Cook on Corp., § 622b, cited in State v. Swanger, 190 Mo. 561 (1905); People *ex rel* Brown v. Koenig, 133 A. D. (N. Y.) 756 (1909); Equitable Life Assurance Society v. Union Pacific R. R. Co., 162 App. Div. (N. Y.) 81 (1914).

[15] Film Producers Inc. v. Jordan, 154 Pac. (Cal.) 605 (1916).

bonds. By a singular coincidence, the United States Steel Corporation was found to be within the descriptive prescriptions, and, with the consent of two-thirds of its outstanding voting stock, it offered the holders of its 7 per cent preferred stock the privilege of exchanging such stock for 5 per cent bonds. The exchange was entirely optional with the holders of the preferred stock, but the measure aroused bitter opposition and litigation. The exchange was finally upheld.[16]

In the absence of permitting statutory provisions, any such exchange or arrangement for such exchange would be illegal.

§ 74. Founders' Shares

In England, founders' shares, a kind of preferred stock which may be described as a privileged deferred stock, are frequently issued. To illustrate, a corporation capitalized at $300,000, with $100,000 of this as preferred stock and $200,000 as common stock, might have $25,000 of this common stock set aside as founders' shares with specified dividend rights equal perhaps to all the other common stock. That is, under the supposed arrangement, after the preferred stock had received its dividend, any further dividends would be divided into two equal parts, one of which would go to the ordinary common stock, the other to the founders' shares. Under this arrangement the $25,000 of founders' shares would equal $175,000 of the ordinary shares as far as participation in dividends was concerned.

Under such conditions the founders' shares might have a value many times in excess of that of the common stock. Where employed, such shares are usually reserved as an emolument for the promoters of the enterprise, or as compensation to men of eminence or financial repute for the use of their names.

[16] Berger v. U. S. Steel Corp., 63 N. J. Eq. 506; s. c., 809 (1902).

It is supposed that under the New Jersey laws, and under the laws of some other states, these founders' shares might be legally issued. Some few companies have been organized upon this basis, but it does not appear that the subject has ever come up for adjudication in this country, and it is not certain what view might be taken of the matter by the courts. Probably, if accomplished by proper charter provisions and with the full knowledge of the stockholders generally and with all due publicity, the arrangement would stand. As everything to be secured by the use of the founders' shares can, however, be accomplished by the skillful but recognized and adjudicated use of common and preferred stock, it would hardly seem wise to venture on ground that is, at the best, experimental and of doubtful utility.

CHAPTER X

FULL-PAID STOCK

§ 75. General

Subscribers to stock on its original issue must pay its par or nominal value under penalty of possible liability to the corporation or its creditors for the amount necessary to make up the full face value of any stock issued for less.

In most states full-paid stock carries no liability, either in favor of the issuing corporation or of the creditors of that corporation. (See § 78.)

§ 76. Watered Stock

Watered stock is stock issued without adequate supporting values therefor having come into the possession of the corporation. Many states explicitly prohibit its issuance by statute. Where not prohibited, watered stock may be created by the issue of "full-paid" stock for cash at less than its par value; by its issuance as a stock dividend without sufficient increase of the corporate property to support the issue; by its issuance as a bonus with preferred stock or bonds; or, as is the method in the great majority of cases, by its issuance for property or services at an overvaluation.

The most obvious form of watered stock is the stock dividend occasionally issued by the large public utility corporations where there is no pretense of any increased value in the property behind the stock, the issue being justified only by an earning capacity sufficient to pay dividends upon the increased capitalization. If the corporation were forced into liquidation, the stock would receive only a fraction of its face

value. Such a stock dividend must be distinguished from a stock dividend paid in lieu of cash dividends of equal amount, where the reserved cash or equivalent property is added to the working capital of the company. In such case the issued stock represents actually increased values, capable of realization in event of the liquidation of the company.

The most common form of watered stock is stock issued in the purchase of property at an overvaluation. Such stock is nominally full-paid, and in some cases by the subsequent prosperity of the corporation the anticipations of its promoters are realized and the stock is removed from the category of watered stock. In the majority of cases, however, the corporation does not meet the expectations of its organizers, and the issued stock is left with but little support. In such case, if the undertaking is of sufficient value in actual property or in possible profits to justify the step, a reorganization takes place, the capital stock is greatly reduced, thereby "squeezing" the water out of it, and the corporation is placed on a decreased, but usually much sounder, basis.

§ 77. Legal Status of Watered Stock

Stock issued for less than its full face value without agreement between the parties thereto as to the nature of such stock, is partly paid stock, and the purchaser is liable to the corporation, or in event of the insolvency of the corporation to its creditors, for the amount necessary to make up the full face value of such stock. If, however, it is agreed between the purchaser and the corporation that the price paid shall be in full settlement of the claims of the corporation against such stock, then as between these parties the stock is full-paid, and in the absence of fraud the holder is under no liability to the corporation.[1]

[1] 1 Cook on Corp., §§ 30, 46; Scovill v. Thayer, 105 U. S. 143 (1881); Christensen v. Eno, 106 N. Y. 97 (1887); Southworth v. Morgan, 205 N. Y. 293 (1912).

This is true as to the corporation but not as to its subsequent creditors unless by agreement of these latter. In event of the insolvency of the corporation, these creditors might proceed against the original purchasers of any watered or partly paid stock so long as such stock remained in their hands, and collect from them the amount necessary to render their stock full-paid.[2]

This possible liability follows the unpaid stock into the hands of transferees purchasing such stock with a knowledge of its character, but does not follow it into the hands of an innocent purchaser for value. (See § 79.)

It is to be noted that the general doctrine as stated requires modification in those cases where the board of directors of a corporation have issued stock for property or services, in good faith and without fraud, and later developments prove the consideration to have been—or to be—worth less than the face value of the stock.[3] In most states of the Union, if it can be shown that the directors exercised proper care in the investigation and acceptance of the property, the courts refuse to hold the recipients of the stock liable on the ground of failure or insufficiency of the consideration.[4]

§ 78. Legal Status of Full-Paid Stock

Full-paid stock carries no liability of any kind, either to the corporation or its creditors, save in those few states where by statute special liabilities have been created. This freedom from liability, no matter what the vicissitudes of the corporation, gives to stock its desirability as a form of investment. As this feature pertains only to full-paid stock, it is a great object in the organization of a new corporation to render its stock full-paid.

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[2] Cohen v. Toy Gun Mfg. Co., 172 Ill. App. 330 (1912); Gilson v. Appleby, 82 N. J. L. 400 (1911).

[3] Douglass v. Ireland, 73 N. Y. 100 (1878); Hayes v. Iron Co., 165 Pa. St. 489 (1895).

[4] Holcombe v. Trenton White City Co., 82 Atl. (N. J.) 618 (1912); Whitlock v. Alexander, 160 N. C. 465 (1912).

Where stock is issued at par for cash, which with financial institutions is usually a matter of statutory obligation, or for cash and substantial property equalling the actual face value of the stock as in the case of solid business corporations, the question does not arise. The ordinary corporation, however, cannot as a rule sell its stock at par, particularly when it is organized for the development of some new or speculative enterprise. To issue such stock direct for less than par would leave the purchasers—if purchasers could be found—liable for the difference. Various expedients are then utilized to render this stock full-paid before it is sold to the actual purchasers for cash, and the methods adopted to secure this end have given rise to most, if not all, of the litigation relating to the full payment of stock. (See Chapter XI, "Treasury Stock.")

§ 79. Certificates for Full-Paid Stock

When stock is full-paid the securities by which it is represented usually bear upon their face the words "Full-Paid and Non-Assessable." There is no legal requirement that the certificates shall be so inscribed, but if they were not the purchasers would—and very properly—be suspicious of the stock. The direct and legitimate inference from the omission would be that such stock was not full-paid and non-assessable and might carry latent liabilities. If stock is not full-paid, the label will not shield stockholders who know the facts.

On the other hand, where certificates are marked "Full Paid and Non-Assessable," such stock may be bought in the open market with full confidence that its purchase involves no unknown liabilities. Even should it later prove to have been but partly paid, or not paid at all, the innocent purchaser for value could not be held liable on that account. He purchased on the faith of the unquestioned statement on the stock certificate that such stock was full-paid, and, as far as he is

concerned, the stock will be held to bear that character.[5] If, however, the purchaser knew that the stock had not been honestly full-paid, he would, as already stated (§ 77), take with notice and might be held liable for any deficiency.[6] Where the statute requires a certificate of full payment to be filed in a public office, the fact that such certificate has not been filed has been held to be sufficient to give a purchaser notice that the stock was not fully paid.[7]

The impressive word "Non-Assessable" merely indicates that the corporation has either received full payment of the stock in question, or otherwise that it has relinquished any claim it might have on such stock for further payments or assessments of any kind. Full-paid stock is non-assessable under any circumstances except in California and a limited number of other states where the statutes permit the corporation to levy assessments.

In some few states certificates representing stock issued for property must bear the legend "Issued for Property" or some equivalent statement. Elsewhere this is neither necessary nor desirable. Such stock is of no different nature or legal status from any other stock, and to inscribe it in the manner indicated conveys the impression that some difference actually exists.

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[5] Cook on Corp., §§ 50, 257, note 4; Sprague v. National Bank of Amer., 172 Ill. 149 (1898); French v. Harding, 83 Atl. (Pa.) 586 (1912).

[6] Cook on Corp., § 49; 2 Clark & Marshall on Corp., § 401k; Wallace v. Carpenter, etc., Co., 70 Minn. 321 (1897); Coleman v. Howe, 154 Ill. 458 (1895); Gillett v. Chicago Title & Trust Co., 230 Ill. 373 (1907).

[7] White, Corbin & Co. v. Jones, 167 N. Y. 158 (1901).

CHAPTER XI

TREASURY STOCK

§ 80. Definition

The term "Treasury Stock" is employed very loosely by business men and accountants to describe unissued stock. It would be better to use the term to designate the issued and outstanding stock of the company that has been donated to or purchased by the corporation and which is held subject to disposal by the directors. Such stock is properly treasury stock, is the property of the company, and technically at least, is an asset on the books of the company.[1]

To style unissued stock "treasury stock" is a misnomer. Unissued stock is merely the privilege of creating a liability. It is not in any sense of the word an asset. For $20 the State of Arizona will charter a corporation and authorize it to issue stock to the face value of $25,000,000 or more. Such a company on organization would have an over-plentiful supply of unissued stock, but no assets whatever. The absurdity of regarding its unissued stock as an asset is obvious. (See § 61.)

Stock that has been once legally issued for full, honest value, however, is of a very different nature. It is then full-paid stock and represents a certain interest in the corporate property. If any of it comes back into the possession of the company it is still "full-paid stock" and is then with some logical correctness considered an asset. Such stock is properly classified as treasury stock and may be sold below par to raise funds for the operations of the company, may be given away as a bonus with preferred stock or bonds, or be other-

[1] Montgomery on Auditing, pp. 133, 134.

wise used without involving the recipient in any liability to creditors of the corporation.[2]

In case such treasury stock were originally issued for property at an overvaluation, an innocent purchaser for value cannot be held liable, but a purchaser with knowledge of the overvaluation might be.[3]

§ 81. Origin

If a corporation were organized upon a strictly cash basis, each subscriber paying the par value for his stock, it would have no treasury stock at the time of organization. Later should a portion of this issued stock come back into the possession of the company in settlement of some debt or through other negotiation, such returned stock would be treasury stock and from the bookkeeping standpoint an asset of the company.

When, however, as is so frequently the case, a corporation is organized under the usual plan to exploit some mine, invention, or other enterprise, or to make a combination of existing corporations, it issues all or a large portion of its stock in payment for the property assigned to the corporation. This stock is thereby rendered nominally full-paid. Then by agreement, or by understanding, the recipient of this stock assigns back to the corporation, or to some trustee for the corporation, a proportion of this full-paid stock to be used for company purposes. This is treasury stock of the company and in the present day it is thus, as a general rule, that treasury stock is obtained. Such stock is usually a clear donation, the disposition to be made of the stock being sometimes prescribed, but generally left to the discretion of the board of directors. Such procedure is not always disapproved by the courts.

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[2] 1 Cook on Corp., §§ 46-50; 1 Morawetz on Corp., § 306; 2 Clark & Marshall on Corp., § 390e; 1 Machen on Corp., § 785; Mosher v. Sinnott, 20 Colo. App. 454 (1905); Lake Superior Iron Co. v. Drexel, 90 N. Y. 87 (1882); Davis Bros. v. Chemical Co., 101 Ala. 127 (1892); Insurance Press v. Montauk, etc., Co., 103 A. D. (N. Y.) 472 (1905).

[3] Alling v. Wenzel, 133 Ill. 264 (1890); Coleman v. Howe, 154 Ill. 458 (1895); Berry v. Rood, 168 Mo. 316 (1901).

"The individual defendants then transferred back to the company a certain amount of stock which was to become the property of the company, and to be disposed of by it for its own benefit. Such a condition is not unusual in companies of this character. In order to make its stock of any value, it was essential that the company should have a working capital in addition to the patents, and the persons who had exchanged their patents for the stock of the company were willing to give to the company a portion of their stock so that the working capital could be secured and thus give value to the remainder of the stock."[4]

It is to be noted, however, that in harmony with the present general trend towards stricter regulation of corporations, the courts are scrutinizing "full-paid" stock of this character much more carefully than heretofore. This is particularly true in New Jersey, where it was formerly supposed that "in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property purchased shall be conclusive"[5]—and this with but little regard as to how this judgment was reached. Recent decisions have, however, rudely disturbed this pleasing supposition. It is now held that the directors' judgment must be based on something more tangible than promoters' statements or vague suppositions. As laid down by the court in a recent case, "it was their duty to have acted as an independent board of directors, with full knowledge, would have acted, namely, to have made a careful inventory and appraisement of all property to be purchased with stock or for cash, and to have either issued stock or paid cash, measure for measure, value for value. This they neglected to do, with the result that those whom they sought to protect are not protected, themselves included."[6]

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[4] Justice Ingraham in Insurance Press v. Wire Co., 103 A. D. (N. Y.) 472, 476 (1905).
[5] P. L. (N. J.) 1893, p. 444, as amended by Laws of 1896, p. 294.
[6] Holcombe v. Trenton White City Co., 82 Atl. (N. J.) 618 (1912).

In this case, treasury stock supposedly full-paid by property in exchange for which it was originally issued, was held not to have been fully paid thereby, and parties to whom it was subsequently issued as treasury stock were held liable to the company's creditors for the unpaid balance.

§ 82. Transfers to Corporation

When stock is donated or otherwise transferred to the corporation, the certificates should not be assigned to the treasurer by name, as to "John Wilson, Treasurer," as at a subsequent election the position of treasurer may be filled by some other person and the too definite indorsement may then cause trouble. Such stock is better indorsed to the company itself, as "The Caswell Company," or to its treasurer, as "Treasurer of The Caswell Company."

A plan that is sometimes pursued when stock is thus turned over for the benefit of the company is to assign it to trustees to hold and sell such stock for the benefit of the company, either at their own discretion or under the superintendence of the directors, the funds so received being paid over to the treasurer of the corporation. This plan relieves the corporation of all responsibility as to the details of the matter, the transaction not appearing on the company's books until the money from the sale of the stock is turned over.[7]

When certificates representing treasury stock are received by the corporation, they should bear the proper indorsements, and are then usually turned over to the secretary. This official should enter the transfer in the stock book, cancel the old certificates and return them to the stock certificate book, and, if desired, issue new certificates in the name of the corporation or of the official by whom the stock is to be held. It is to be noted that new certificates need not necessarily be issued at all until sales of treasury stock are made, when the

[7] Wood v. Sloman, 150 Mich. 177 (1907).

certificates representing stock sold might be issued directly to the purchasing party. In such case, until the time of sale, the stock book, in connection with the cancelled certificates of the stock certificate book, is sufficient evidence of the status and ownership of such treasury stock.

§ 83. Transfers from Corporation

When treasury stock is sold the formalities are simple. The sale being duly authorized by the directors, the treasurer would, if the stock were held by him and the original certificates had been cancelled without reissue, merely give the purchaser an order for the required certificates, or instruct the secretary in writing to issue such new certificates. If the original had been cancelled and new certificates issued to the treasurer, this latter official would merely assign one of his certificates, if of the right denomination. If otherwise he would have one broken up, the proper number of shares being issued therefrom to the new purchaser and the unsold remainder being issued to the treasurer. If the certificates had been held in the name of the corporation, the treasurer or such other official or officials as were designated by the board would make the proper assignments.

§ 84. Legal Status of Treasury Stock

When its own stock is returned to and is held by the corporation, or by trustees or by its own officers for the corporation, such stock is not unissued stock, nor do the stockholders as such have any subscription or participation rights when it is reissued.[8] So long as such stock is held by the corporation, it is inert and can neither vote nor participate in dividends.[9] Should the stock be voted, such action

[8] Crosby v. Stratton, 17 Colo. App. 212 (1902); Hartley v. Pioneer Iron Works, 181 N. Y. 73 (1905).

[9] 3 Clark & Marshall on Corp., § 655; Vail v. Hamilton, 85 N. Y. 453 (1881); Am., etc., Co. v. Haven, 101 Mass. 398 (1869); O'Connor v. Int. Silver Co., 68 N. J. Eq. 67 (1904).

would be illegal and any action or election decided by such vote of treasury stock would be illegal and might be set aside. If dividends should be declared and paid upon such stock, the action would be unauthorized and also meaningless as the money so paid would come directly back into the treasury of the corporation.

§ 85. Stock of Other Corporations Held in Treasury

It is to be noted that the comments of the preceding section do not in any way apply to stock of other corporations which may be owned and held in the treasury of any particular corporation. Such stock is personal property of the corporation, is liable to taxation as such, and all its corporate rights and privileges are maintained in full vigor. It participates to the full in any dividends declared by the corporation from which it issued, and is entitled to full representation and voting rights at any stockholders' meeting of that corporation. Such stock would be voted, either in person or by proxy, by the trustee or official in whose name it was held, or if held in the name of the corporation by such person as was formally designated thereto by the corporation. Such vote would be cast under the general instructions of the board of directors of the holding corporation, but, unless matters of much importance were to be considered, no detailed instructions would be given, all this being left to the discretion of the person who represented the corporation. If matters of much importance were to be considered, the representative might be instructed with precision as to his position and his vote.

It is to be noted, however, that a corporation cannot legally hold the stock of another corporation unless specifically authorized by statute, as in Delaware, or by charter provision allowable under the statutes, as in New York.[10]

[10] Dunbar v. Amer. Tel. Co., 238 Ill. 456 (1909).

Part IV—Corporate Control

CHAPTER XII

STOCKHOLDERS

§ 86. General

"The shareholders are persons who are interested in the operation of the corporate property and franchises, and their shares actually represent undivided interests in the corporate enterprises. The corporation has the legal title to all the properties acquired and appurtenant; but it holds them for the pecuniary benefit of those persons who hold the capital stock. They appoint the persons to manage its affairs, they have the right to share in surplus earnings and, after dissolution, they have the right to have the assets reduced to money and to have them ratably distributed. Each share represents a distinct interest in the whole of the corporate property."[1]

In the active affairs of the corporation the stockholders occupy a position of minor importance. They own the stock of the corporation, and, through that ownership, the corporation itself with all its belongings. Their control of the organization and their management of its affairs is, however, indirect and somewhat removed. The profits of the business belong to them but its actual management and the general control of the corporation are in the hands of the directors, with whom the stockholders, either individually or collectively, cannot directly interfere.

"The functions of stockholders are exceedingly limited.

[1] *In re* Bronson, 150 N. Y. 1 (1896).

The theory of a corporation is that stockholders shall have all the profits, but shall turn over the complete management of the enterprise to their representatives and agents, called directors. Accordingly there is little for the stockholders to do beyond electing directors, making by-laws, increasing or decreasing the capital stock, authorizing amendments to the charter, and dissolving the corporation."[2]

§ 87. Functions

As already intimated, the functions of the stockholders are few and simple. They assemble once a year in annual meeting to listen to reports, elect directors, and discuss the general affairs of the company. On rare occasions they are assembled for particular action in special meeting. If the charter is to be amended, they are usually required to act. If all the assets of the corporation are to be sold, they must generally be called upon to sanction the proceeding. In some states their consent is required to validate corporate mortgages. They would act on any proposed liquidation of the corporation. By charter provisions, their consent may be necessary to other proposed action. One other most important function pertains to the stockholders: the right to make, amend, and repeal the by-laws.

The active connection of the stockholder with his corporation is, under normal conditions, limited to the functions specified. The further control and direction of the corporate organization and its property and business are left entirely to the directors he has elected.

§ 88. Rights

The rights of stockholders discussed in the present chapter are those general rights which are incident to the ownership of common stock in a stock corporation. The

[2] 3 Cook on Corp., § 708; see also § 711.

holders of preferred stock have all these same rights—in addition to their special rights—unless denied, varied, or restricted by the terms of issue.

Every stockholder has the right to transfer stock freely, to have his name appear as that of a stockholder upon the stock books of the company, and, when his stock is full-paid, to have a stock certificate. In addition, the ordinary individual rights of a holder of stock are:

1. To be notified of and participate in all stockholders' meetings in person or by proxy, and usually for each share of stock standing in his name upon the books of the corporation to cast one vote at any election of directors or upon any question that may come before such meeting.
2. To share, in proportion to the amount of stock owned, in all dividends declared on the common stock, and to subscribe in like proportion for any increase of the capital stock.
3. In event of the dissolution of the corporation, to share in proportion to the amount of stock owned in any assets remaining after the corporate debts and obligations have been paid.
4. To inspect the corporate books and accounts.

These rights are discussed in detail in the sections which follow.

§ 89. (1) Notice of Meetings and Voting

As a matter of common or statutory law the stockholder is entitled to due notice of all stockholders' meetings. If the time of the annual meeting is specified in the by-laws, this in itself is presumed to be notice to the stockholder, and the fact that he does not receive a personal or mail notice and is for this reason not present, does not affect the validity of

such meeting. But where, as in New York, the statute requires publication of the notice of the annual meeting, or where the by-laws provide how notice shall be given the statute or the by-laws must be complied with unless waived by all of the stockholders.

Unless expressly denied in some way, every stockholder, whether his stock be common, preferred, or special, has the right to participate in and vote at all meetings of stockholders. Usually he is entitled to cast one vote on all matters passed upon at stockholders' meetings for each share of stock standing in his name upon the books of the corporation—a right secured to him in a majority of the states by express statute provision. In other states the right, if desired, should be definitely set forth and secured by proper provision in the charter or by-laws. If this is not done, the common law prevails, under which every stockholder is entitled to one vote on all matters passed upon by the stockholders, regardless of the amount of stock he holds.[3]

If the statutes make no provision as to voting, the matter may be regulated by either charter or by-laws. In some few states, as in Washington and Maine, the statutes expressly authorize such regulation by the by-laws. In others, as in Connecticut, Delaware, New Jersey, and Nevada, the statutes provide the method that shall be followed in voting unless otherwise prescribed by charter or by-laws. In these states it is possible to deprive entirely certain classes of stock of the voting power. It is not unusual to provide that preferred stock shall have no vote where the holders of the common stock are the active stockholders and the preferred stock represents investments by outsiders. In California the statute forbids any such denial of voting power.

The statutes usually prescribe that voting at elections of directors shall be by ballot. Where no special method of

[3] Taylor v. Griswold, 14 N. J. L. 222 (1834).

voting is prescribed by statutes, charter, or by-laws, it may be by call of roll, by ballot, or by any other method that will properly and legally indicate the sense of the meeting. If all are agreed, it is always permissible to instruct the secretary to cast the single ballot of the meeting for the election of specified candidates for directors, or for or against any other measure properly before the meeting.

As between the corporation and its members, the right to vote and usually also the number of votes a stockholder is entitled to cast is determined by the stock books of the corporation.[4] The possession or non-possession of a stock certificate is immaterial.

The right to vote by proxy is generally given by express provision of either the statutes or by-laws, though in some states the right is secured by constitutional provision. It did not exist at common law.[5]

Trustees may vote upon the stock held in their names as trustees. An executor or administrator may vote upon the stock belonging to the estate even though standing in the name of the deceased party. In the absence of disagreement, any partner may vote stock standing in the partnership name. A corporation holding stock of another corporation may vote such stock through duly authorized agents. A receiver usually votes stock in his possession. When stock is held jointly or in common, as in the case of a partnership or where there are two or more trustees or executors, all must agree on the vote or otherwise it will be lost.[6]

§ 90. (2) Dividends and Participation Rights

Save when affected by the issue of some preferred or other special stock, each stockholder has the right to share

[4] Commonwealth v. Dalzell, 152 Pa. St. 217 (1893); State v. Ferris, 42 Conn. 560 (1875); *In re* Argus Printing Co., 1 N. D. 434 (1891).
[5] Taylor v. Griswold, 14 N. J. L. 222 (1834); Philips v. Wickham, 1 Paige (N. Y.) 590 (1829); Commonwealth v. Bringhurst, 103 Pa. St. 134 (1883).
[6] Tunis v. Hestonville, etc., Co., 149 Pa. St. 70 (1892).

in dividends with the other stockholders of his corporation proportionately to the number of shares of stock he holds, and there must be no discrimination of any kind in the declaration or the payment of these dividends.

Holders of preferred stock, unless otherwise expressly provided, are entitled in any year to payment of their preferred dividends before any dividends are paid the common stock, and thereafter, as soon as the common stock has received an equal dividend, to participate equally with the common stock in any further dividends declared in that year.[7] Unless otherwise provided, dividends on preferred stock are cumulative, and current dividends on preferred stock and all arrears must be paid before dividends may be paid on the common stock.[8]

If the capital stock of a corporation is increased, each stockholder has the right to subscribe for the new stock proportionately to his holding of the old outstanding stock.[9] Thus if he holds 10 per cent of the outstanding stock and the capital stock is increased, he has the privilege of subscribing for 10 per cent of the new stock. This rule applies to any actual increase of stock, but not to a sale of treasury stock, nor usually to stock which is part of the original capitalization but which has not yet been issued.[10] If, however, this unissued stock has been held for a considerable period of time and is then issued, the stockholders should all have an equal opportunity to subscribe therefor.[11] Holders of preferred stock have the same rights of subscription as do holders of common stock, unless expressly denied them by the provisions which created the preferred stock.

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[7] Sternbergh v. Brock, 225 Pa. St. 279 (1909); Sterling v. H. F. Watson Co., 241 Pa. St. 105 (1913).

[8] Fidelity Trust Co. v. Lehigh Valley R. R. Co., 215 Pa. St. 610 (1906); Boardman v. Lake Shore Ry. Co., 84 N. Y. 157 (1881).

[9] Way v. Am. Grease Co., 60 N. J. Eq. 263 (1900); Electric Co. v. Edison, etc. Co., 200 Pa. St. 516 (1901); Stokes v. Cont. Trust Co., 186 N. Y. 285 (1906).

[10] Crosby v. Stratton, 68 Pac. Rep. 130 (1902); Archer v. Hesse, 164 App. Div. (N. Y.) 493, 497 (1914).

[11] Electric Co. v. Edison El. Co., 200 Pa. St. 516 (1901).

The right of subscription is sometimes of considerable value, as where a new issue of stock is authorized at a fixed price and this price advances before the day of sale.

§ 91. (3) Distribution of Assets on Dissolution

Each stockholder is entitled to share equally in any distribution of the assets of the corporation, whether on final distribution or on some partial intermediate distribution. Under whatever proceedings a corporation is dissolved, the general rule holds that all corporate obligations and the expenses of the proceedings must first be discharged, and that any remaining assets must be distributed among the stockholders, the same rules applying as to equality of payment, of time, and of kind, as in the case of dividends.[12]

In the absence of any express provision to the contrary, common and preferred stock share alike in the distribution of assets.[13] If by its terms preferred stock takes precedence, it must first receive any assets available for distribution up to its full face value. The common stock then receives any remaining assets up to its full face value. If any balance of assets still remains, both common and preferred stock participate therein alike, unless otherwise expressly provided.

§ 92. (4) Inspection of Books

Under the common law every stockholder had the right to inspect the books and accounts of the corporation in person or by agent and to make abstracts or copies therefrom without restriction, save that the examination be made at a reasonable time and for a proper purpose. This is the rule in states where there is no statutory regulation.[14]

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[12] 2 Cook on Corp., § 641.

[13] Coltrane v. Building Assn., 110 Fed. Rep. 281 (1901).

[14] Ranger v. Champion Cotton Press Co., 51 Fed. 61 (1892); Huylar v. Cragin Cattle Co., 40 N. J. Eq. 392 (1885); Matter of Steinway, 159 N. Y. 250 (1899); State v. Jessup & Moore Paper Co., 88 Atl. (Del.) 449 (1913); State v. Insurance Co., 169 Mo. App. 354 (1912).

In some states the statutes provide that a stockholder desiring to examine the books of account or the records of his corporation must, if refused, secure an order of court for such examination, which will be granted only when he shows some good reason therefor.[15] This reason must be substantial and must be for the specific purpose of investigating some matter concerning the management of the corporation in which his rights as a stockholder are or may be affected injuriously.[16]

This restriction of the right is not unreasonable. It is obvious that it would be impracticable in a large modern corporation with its multitude of scattered stockholders to allow these to come in at any time and make an examination of the books. The interference with the regular business would in itself be intolerable, but beyond this the right might be so used in the interest of business competitors as to render it destructive of the interest of the stockholders at large.

In some states statutes have been passed which enlarge the stockholders' usual right to examine the corporate records, and in a few states the right has been considerably extended. These statutes give the stockholders the right to inspect the corporate records irrespective of the purpose for which the inspection is sought.[17] In some states this right extends to all of the corporate records, and in most of the states there is a statutory right to inspect the stock and transfer books.[18] In New Jersey the courts hold that even this right cannot be enforced unless the stockholder can show some reason for his inspection "germane to his status as a stockholder."[19] In many of the states a statutory penalty is imposed on the

[15] Varney v. Baker, 194 Mass. 239 (1907); Kuhbach v. Irving, etc. Co., 220 Pa. St. 427 (1908).
[16] Phoenix Iron Co. v. Commonwealth, 113 Pa. St. 563 (1886).
[17] Poor v. Yarnell, 153 Pac. (Cal.) 976 (1915); Baumrucker v. Jones, 172 Ill. App. 188 (1912).
[18] Lozier v. Saratoga, etc. Co., 59 App. Div. (N. Y.) 390 (1901); State v. Middlesex Banking Co., 87 Conn. 483 (1913); Wilkington v. Bradley, 111 Me. 384 (1914).
[19] State v. National Biscuit Co., 54 Atl. (N. J.) 241 (1903).

corporate officers who refuse a stockholder the right of inspection prescribed by the statutes. In such cases the stockholders' rights are not difficult of enforcement.[20]

Where the right to examine the corporate records exists, it includes the right to make copies and abstracts.[21] It also includes the right to be accompanied by the party's attorney or expert accountant, or the inspection may be delegated to one or both of these.[22]

Lists of stockholders in the larger corporations have an actual money value, and in New York the practice of acquiring a share of stock in one of the large companies for the sole purpose of using the right thus obtained to copy the list of stockholders and of then selling the list, became so flagrant that in 1916 the legislature amended the law so as to limit the right of inspection to persons who have been stockholders of record of six months, or to persons holding stock equal to 5 per cent of all the outstanding shares. The statute expressly provides, however, that nothing therein shall impair the right of the courts to compel by mandamus the production of the stock book for the examination of any stockholder upon good cause shown.

§ 93. Special Charter Rights

In many states special provisions for the regulation of the business and the conduct of the affairs of the corporation may be inserted in the corporate charter. Where this privilege exists, rights not usually belonging to the stockholders of a corporation may be thereby secured. Thus, stock may be classified so as to give the minority stockholders unusual voting powers; minority representation may be insured by cumulative voting; the right to examine books may be de-

[20] Lozier v. Saratoga, etc. Co., 59 App. Div. (N. Y.) 390 (1901).
[21] Cincinnati Volksblatt Co. v. Hoffmeister, 62 O. St. 189 (1900).
[22] People v. Nassau Ferry Co., 86 Hun 128 (1895); State v. Insurance Co., 169 Mo. App. 354 (1912); Varney v. Baker, 194 Mass. 239 (1907).

fined and extended; the right to be present at directors' meetings may be given; it may be provided that profits when they exist shall be declared as dividends at regular intervals, or the power of the directors to pay salaries, contract debts, sell corporate property, and the like, may be restricted.

It should be noted that special provisions incorporated in the charter are difficult of repeal or amendment. For this reason only those which are expressly desired to be permanent should be made the subject of charter provision. Less important provisions are better included in the by-laws, where they may be changed when necessary with less formality.

§ 94. Statutory Rights

In most of the states the usual common law rights of stockholders—discussed in the preceding sections—have been re-enacted in the statutes. In many states the statutes give the stockholders additional rights, some of which have already been mentioned. Thus, in New York, Kansas, North Dakota, and a number of other states, stockholders may call for statements and reports from the corporate officials. In California and Washington they may inspect mines owned by the corporation. In Connecticut any stockholder may apply for a mandamus to compel the corporation to obey the statutes. In Delaware any stockholder may demand a statement of amounts paid on capital stock and the amount of stock issued. In a number of states meetings for election of directors may be compelled by following prescribed procedure.

§ 95. Powers

The individual stockholder, no matter how large his holding, has no power as a stockholder to interfere in the lawful management of the company or its business.[23] If the directors

[23] Demarest v. Spiral, etc. Tube Co., 71 N. J. L. 14 (1904); Continental Securities Co. v. Belmont, 206 N. Y. 7, 16 (1912).

take, or are about to take any illegal or wrongful action, he may restrain them by appeal to the courts. If, however, the action taken or about to be taken is in itself not unlawful but merely objectionable to him, his only recourse is to induce, if he can, a majority of the stockholders to act with him in a duly assembled stockholders' meeting, when the by-laws may be amended or such other remedial steps be taken as may be possible.

The collective powers of the stockholders apply to but few matters and may be summarized as follows:

1. Amendment of charter.
2. Adoption, repeal, or amendment of by-laws.
3. Election of directors.
4. Sale of entire assets.
5. Dissolution of corporation.
6. Exercise of any special charter powers.

§ 96. (1) To Amend Charter

A charter is a contract between the state and the stockholders of the particular corporation, and the assent of both the state and these stockholders is a prerequisite to its amendment. In most of the states the statutes provide that the charter may be added to or amended, usually in certain prescribed details or matters, by the action of a specified proportion of the stockholders ranging upward from a bare majority to three-fourths of the outstanding stock.

§ 97. (2) To Adopt, Repeal, or Amend By-Laws

The adoption or amendment of by-laws is one of the common law powers of the stockholders. If no provision is made otherwise, the power to adopt, amend, and repeal by-laws rests with the stockholders alone,[24] who must, to

[24] Angel & Ames on Corp., § 327.

exercise this power, be duly assembled in a meeting at which such action can be lawfully taken.[25] If the charter or by-laws do not otherwise prescribe, the by-laws may be adopted, amended, or repealed at any regular meeting of the stockholders or at any special meeting where such proposed action has been duly announced. There is some question whether by-laws may be adopted or amended without previous notice at the annual meeting held in accordance with statutory requirements, unless the charter or by-laws expressly so provide.[26]

If the power to adopt by-laws is delegated to the directors, this does not, unless expressly so stated, confer on them the exclusive right to make by-laws nor empower them to repeal by-laws enacted by the stockholders.[27]

§ 98. (3) To Elect Directors

The election of directors is one of the common law powers of stockholders which has been re-enacted in the statutes of most of the states. In all corporations for profit the power exists without specific statutory authority.[28]

In the absence of other provision, the stockholders have the right to fill vancancies in the board of directors. Ordinarily, however, either by statute or by-law provision this power is given to the board.

§ 99. (4) To Sell Entire Assets

A solvent corporation can sell only its entire assets by the unanimous consent of all its stockholders.[29] Where, however, a corporation is financially involved or likely to become so, the sale of all its property may be made in any manner

[25] North, etc. Co. v. Bishop, 103 Wis. 492 (1899).
[26] Bagley v. Reno, etc. Co., 201 Pa. St. 78 (1902).
[27] Stevens v. Davison, 18 Gratt. (Va.) 819 (1868).
[28] *Re* Union Ins. Co., 22 Wend. 591 (1840).
[29] Abbott v. American Hard Rubber Co., 33 Barb. 578 (1861); People v. Ballard, 134 N. Y. 269 (1892); Eldred v. American Palace Car Co., 96 Fed. Rep. 59 (1899); 99 Fed. Rep. 168 (1900).

that will secure a fair return, by authorization of a majority of the stockholders.[30] Also if the statutes or charter so provide, the entire assets of a corporation may be sold by action of a majority of the stockholders, or by majority action of the directors, the prescribed formalities being duly observed.[31]

§ 100. (5) To Dissolve the Corporation

"It is an unquestioned rule that all the stockholders, by unanimous consent, may effect a dissolution of the corporation by the surrender of the corporate franchises."[32] Where the corporation is insolvent or is in danger of becoming insolvent, and is unable to further conduct its corporate business, a majority of the stockholders may effect its dissolution. This is the extent of the power of the stockholders under the common law.[33]

Statutory provisions, however, exist in a majority of the states prescribing procedure whereby dissolution may be had by action of a stated majority of the stockholders.

§ 101. (6) Special Powers

In many states special powers are conferred upon the stockholders by express statutory provision. Thus in Kentucky, Maine, and some other states, it is provided that corporations may merge or consolidate with others upon the consent of a prescribed majority of the outstanding stock, usually with a provision for the appraisement and purchase of the stock of any dissenting stockholder. In New York, Pennsylvania, and some other states it is provided that any mortgage of corporate property must be authorized by a vote of the stockholders. In several states, as California and

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[30] Sewell v. East, etc. Co., 50 N. J. Eq. 717 (1892); Skinner v. Smith, 134 N. Y. 240 (1892); Hayden v. Official Hotel Red-Book, etc. Co., 42 Fed. Rep. 875 (1890).
[31] Republican, etc. Mines v. Brown, 58 Fed. Rep. 644 (1893); Peabody v. Westerly Waterworks, 20 R. I. 176 (1897).
[32] 2 Cook on Corp., § 629.
[33] Berry v. Broach, 65 Miss. 450 (1888); Price v. Holcomb, 89 Iowa 123 (1893).

Montana, directors may be removed by a two-thirds vote of the entire stock. In the states where special provisions may be inserted in the charter, as in New York, Delaware, and South Dakota, it is possible to extend the powers of stockholders far beyond their usual scope.

§ 102. Liabilities

The liabilities of stockholders as such are few—usually only to pay the full par value of the stock subscribed for or purchased by them. If subscriptions are not paid according to their terms, or—when subscriptions are unconditional—as calls are made by the directors, the corporation may either bring suit to collect unpaid amounts, obtain judgment and levy on the stock if necessary,[34] or, where the statutes give such power, may forfeit the delinquent stock. If the corporation does neither, the liability of the stockholder on his unpaid stock still remains for the benefit of creditors of the corporation in case of its insolvency.[35]

When the statutory forfeiture of stock for unpaid calls is enforced in good faith, a stockholder who is thus deprived of his stock is released from further liability to the corporation and its creditors. When stock is so forfeited, it is necessary to observe the prescribed statutory formalities carefully, as otherwise the proceedings may be set aside and the corporation be liable in damages.[36]

As a rule, corporate creditors must first proceed against the corporation for the collection of their claims. If they secure judgment against the corporation and are unable to collect from it, they may then proceed against any stockholder who has not paid in full for his stock.[37] If, however, the corporation has been dissolved or is notoriously insolvent,

[34] Nashua Bank v. Anglo-Am. Co., 189 U. S. 221 (1903).
[35] Scovill v. Thayer, 105 U. S. 143, 156 (1881); Hawkins v. Glenn, 131 U. S. 319, 334 (1888).
[36] Lewey's Island R. R. Co. v. Bolton, 48 Me. 451 (1860).
[37] Wetherbee v. Baker, 35 N. J. Eq. 501 (1882).

creditors may sometimes proceed directly against the stockholders of the corporation.[38] If the corporation goes into the hands of an assignee, a receiver or a trustee in bankruptcy, it is the duty of that official to collect all unpaid subscriptions.[39]

The fact that other stockholders have not paid their subscriptions does not avail a stockholder as a defense against payment of his own subscription. Nor has he any claim against these other subscribers. When, however, payment of his subscription is enforced by corporate creditors, the conditions are different. A corporate creditor need not, as a rule, proceed against or join all the stockholders whose subscriptions are unpaid but may collect from any one or more of them up to the full amount due on their stock if his claim amounts to so much. In such case, as the corporate debts are a joint obligation to be borne by all the delinquent stockholders in proportion to the amounts due on their stock, any subscribers who are compelled to pay more than their due proportion can compel contribution from other delinquent stockholders up to their proportion of the debts paid.[40]

The stockholder who is not an original subscriber, but who purchases outstanding stock in good faith with the understanding or express statement that it is full-paid, and particularly when the certificates are so marked, does not incur any liability either to the corporation or its creditors even though the subscription price or the par value of such stock has not been paid in to the corporation. In any such case the unpaid liability on the stock either remains with the transferrer or is lost.[41]

When, however, a purchaser takes unpaid stock with a

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[38] Terry v. Tubman, 92 U. S. 156 (1875); Terry v. Anderson, 95 U. S. 628, 636 (1877).

[39] *In re* Crystal Spring Co., 96 Fed. 945 (1899); Scovill v. Thayer, 105 U. S. 143 (1881).

[40] 4 Thomp. Corp., § 3816.

[41] Brant v. Ehlen, 59 Md. 1 (1882); Rood v. Whorton, 67 Fed. 434 (1895).

knowledge of the conditions, the liability for any call already made, even though the payment date of such call has not yet arrived, remains with the transferrer, but the transferee is liable for any subsequent calls.[42]

The general rule is, however, modified by statute in many of the states. Thus in Oregon and Tennessee the liability on unpaid stock remains with the transferrer, while in Kentucky it continues with the transferrer for two years from the date of transfer, and in Maine and Mississippi for one year. In Wisconsin the liability may be shifted to the transferee with the consent of the corporation but the liability of the seller continues notwithstanding for six months after the transfer. In Nebraska the liability follows the unpaid stock. In Illinois both transferrer and transferee are liable.

The common law liability of holders of unpaid stock for any unpaid portion of its par value is confirmed by statute in most states of the Union. In a few states this common law liability has been extended, and in a number of states additional liabilities are imposed. These subsequent or additional liabilities extend to all stockholders whether their stock is full-paid or otherwise. This liability on unpaid stock may, by agreement of the corporation, be terminated as between the corporation and its stockholders, but would still exist as between these stockholders[43] and creditors of the corporation, and on the insolvency of the corporation would become immediately effective.[44] (See § 3.)

[42] Webster v. Upton, 91 U. S. 65 (1875).
[43] Goodnow v. Amer. Writing Paper Co., 66 Atl. (N. J.) 607 (1907); Bostwick v. Young, 118 App. Div. (N. Y.) 490 (1907); affd., 194 N. Y. 516 (1909).
[44] Merchants Mutual Adjusting Agency v. Davidson, 23 Cal. App. 274 (1913); Southworth v. Morgan, 205 N. Y. 293 (1912); Dickerman v. Northern Trust Co., 176 U. S. 181 (1900).

CHAPTER XIII

DIRECTORS

§ 103. Powers of Directors

The board of directors is the managing body of the corporation. Unless restricted by statute, charter, or by-laws, it exercises the active controlling power in all corporate business. "The board of directors and not the stockholders, nor the president, secretary, treasurer, or other agent, is the original and supreme power in corporations to make corporate contracts."[1] The directors are the embodied power of the corporation, so constituted by the mere fact of their appointment.[2] The stockholders can neither force the directors to act nor restrain them from acting—save by charter or by-law provision—unless the omission in the one case or the act in the other is so glaringly unjust or injurious to the interests of the stockholders as to warrant an appeal to the courts.

The powers of the board do not, however, extend beyond the purposes for which the corporation was formed. Thus the sale of the entire assets, the dissolution of the corporation or a radical change of its business are not within the unsupported power of the board. Also the statutes in the different states restrict in greater or less degree the common law powers of the board. Thus, as a rule, directors are not allowed to issue bonds or to mortgage corporate property unless expressly authorized thereto by the stockholders. Also the absolute authority of the board may always be limited by charter or by-law provisions. On the other hand, the powers of directors are sometimes extended by charter

[1] 3 Cook on Corp., § 709, 712.
[2] Landers v. Frank St. M. E. Church, 114 N. Y. 626 (1889).

or by-law provisions, or by the statutes, in the latter case mainly as to adoption of by-laws.

The authority of the directors may be exercised only as a board in duly assembled meeting with a quorum present.[3] A single director, as such, has absolutely no authority over the corporate affairs.[4] He may be appointed by the board to manage some feature of the corporate business, or as managing director may practically control the corporate affairs, but in any such case his powers are only those which are delegated to him by the board and are limited strictly by the terms of his appointment.[5] As a knowledge of the corporate affairs is essential to the proper discharge of his duties, he has a right to inspect the records and the property of the corporation and to familiarize himself with its operations.[6] He is also entitled to attend any meeting of the standing committees,[7] to be notified of all special meetings of the board, to attend all board meetings and to be heard, if he so desires, on all matters coming before any such meeting.[8] If he discovers anything wrong in the conduct of the corporate affairs, he has no individual power to right it, but must present the matter to the board for its action.

Directors of a corporation are virtually trustees for the body of stockholders, and must exercise the same care and diligence in the conduct of the corporate affairs as prudent business men would exercise in the conduct of their own affairs.[9] As trustees, they must have no interest adverse to the interest of the company. Too often directors are not as scrupulous as they should be in this particular.

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[3] North Hudson, etc. Assn. v. Childs, 82 Wis. 460 (1892); Ames v. Goldfield Merger Mines Co., 227 Fed. 292, 301 (1915).

[4] Alabama Nat. Bank v. O'Neil, 128 Ala. 192 (1900); Gaynor v. R. R., 189 Pa. St. 5 (1899).

[5] Clark & Marshall on Corp., § 690.

[6] People v. Throop, 12 Wend. (N. Y.) 183 (1834); Rosenfield v. Einstein, 46 N. J. L. 479, 484 (1884).

[7] Western Ry. v. Rushout, 5 De G. & Sm. 290 (1852).

[8] Metropolitan, etc. Co. v. Domestic, etc. Co., 44 N. J. Eq. 568 (1888); Curtin v. Salmon, etc. Co., 130 Cal. 345 (1900); Broughtor v. Jones, 120 Mich. 462 (1899).

[9] 3 Cook on Corp., § 648; Elliott v. Baker, 194 Mass. 518 (1907); Gen. Rubber Co. v. Benedict, 215 N. Y. 18 (1915).

§ 104. Appointment and Removal of Officers and Agents

The authority of the board to appoint and remove officers and agents of the corporation is not a common law power, but must be given it by statute, charter or by-law provision. Unless this is done, the power belongs to and may be reserved by the stockholders. (See §§ 115, 120.)

§ 105. Appointment of Standing Committees

Standing committees are those permanent committees of the board to which some measure of its discretionary power has been delegated. The board has general power to appoint standing committees. Their purpose is twofold: (1) to secure the prompt, decisive action of a small, easily assembled body, and (2) to obviate the necessity for frequent meetings of the board.

As the discretionary powers of the board itself are delegated to standing committees, they must be composed of members of the board. Their powers are exercised during the interim between the board meetings, and within the limits of their authority they act with the same binding force and effect as the board itself and their contracts are not subject to revision by the board.

When authorized thereto by the charter or by-laws of the corporation, the power of the board to delegate its authority to properly constituted standing committees is well established. How much power should be so delegated is to be determined by the nature and conditions of the company's business.

It is but rarely that more than two standing committees are deemed necessary. If but one committee exists, it is usually termed the "executive committee," and its powers are ordinarily those of the board. If two committees are appointed, the second is usually designated the "finance committee," and to this committee is given direct supervision of

the corporate finances and accounts; all general matters remaining in charge of the executive committee. The matter is, however, one to be regulated by the charter or by-laws, and variations of the usual arrangements are frequent.

When standing committees are appointed with the usual powers, they are the real managing bodies of the corporation, the board merely receiving their reports and supervising their operations. In a small corporation or any corporation with a compact, easily assembled board, they are, as a rule, an unnecessary and even undesirable complication. They are advantageous only when the board is so large or so scattered as to be difficult of assembling, or when for other reasons the business of the corporation cannot be properly transacted by the board as a whole. Not infrequently the standing committee is used as a device by which a few men practically manage the affairs of the corporation, the board being superseded when there is no real reason for such action.

The membership of standing committees is seldom less than three, nor, save in very large corporations, more than five. To increase the number renders the standing committee unwieldy and defeats the purpose of its creation.

§ 106. Adoption of By-Laws

Originally the stockholders were supposed to express their wishes as to the management of the corporation through the by-laws, and the directors to exercise their powers in subordination thereto.[10] Of late years, however, in many states the statutes confer upon the directors more or less extended power to adopt by-laws. In some of these states the by-laws adopted by the directors must be either in harmony with the by-laws passed by the stockholders, or subject to their revision, but in some few states the board is given the sole and

[10] North Milwaukee, etc., Co. v. Bishop, 103 Wis. 492 (1899); Morton, etc., Co. v. Wysong, 51 Ind. 4 (1875).

entire right to adopt by-laws. Also in some other states they are given power to make by-laws for their own government. When the stockholders have by by-law provision delegated the power of making by-laws to the directors, it has been held that the directors are not thereby authorized to repeal by-laws passed by the stockholders.[11] Unless directors are given independent power to adopt by-laws by statute or charter provisions, their by-laws may be repealed or amended at any duly assembled stockholders' meeting.

§ 107. Common Law Liability of Directors

The liabilities of directors fall naturally under two heads —common law liabilities and liabilities imposed by statute. Under the common law the directors are personally liable for loss or damage resulting from *ultra vires* acts;[12] for any unlawful corporate act committed with their connivance, assent, or knowledge; for issuance of unpaid or partly paid stock as full-paid; for paying dividends, either negligently or wilfully, that impair the capital stock, and for any other gross mismanagement. As trustees for the company, they are bound to give its affairs all requisite care and attention. If they do not, they are responsible for any resulting loss or damage.[13] They are not, however, responsible for the results of errors of judgment in their management of the ordinary business affairs of the corporation.[14]

§ 108. Statutory Liabilities of Directors

In almost every state of the Union liabilities have been imposed upon directors by statute. Thus in New York—

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[11] Stevens v. Davison, 18 Gratt. (Va.) 819 (1868).

[12] National Cash Reg. Co. v. Leland, 94 Fed. 502 (1899); McKinnon v. Morse, 177 Fed. 576 (1910); Hill v. Murphy, 212 Mass. 1, 2 (1912).

[13] 3 Cook on Corp., § 703; Cassidy v. Uhlmann, 170 N. Y. 505 (1902); Hayes v. Pierson, 65 N. J. Eq. 353 (1903); Elliott v. Baker, 194 Mass. 518 (1907); Childs v. White, 158 App. Div. (N. Y.) 1 (1913).

[14] Chick v. Fuller, 114 Fed. 22 (1902); United Zinc Cos. v. Harwood, 216 Mass. 474, 476 (1914); Holmes v. St. Joseph Lead Co., 168 App. Div. (N. Y.) 688 (1915).

a typical state—directors may be held personally liable as follows:

1. For declaring dividends except from surplus profits, or for dividing, withdrawing, or paying out any part of the capital except that authorized by law.
2. For making a loan of corporate money to any stockholder, or for discounting from corporate funds any note or evidence of debt for any stockholder, or for receiving the same for any instalment due on stock.
3. For making any certificate or report or public notice that is false in any material respect.
4. For making transfers of property to officers or stockholders when the company is insolvent or threatened with insolvency, for the purpose of preferring or defrauding creditors.
5. In case of dissolution, as trustees for all corporate property that may come into their hands.

In the majority of the states directors guilty of most of the enumerated offenses are not only personally liable, but are also criminally liable under the laws against fraud, larceny, and embezzlement.

When any action is taken by the board in violation of law or which might involve its members in a liability, any dissenting director may always relieve himself from responsibility by proper procedure. In some states this procedure is prescribed by statute. Usually it involves the entry of his dissent or protest on the minutes of the particular meeting, or, if such entry is refused, publication of the protest.

It may be said generally that the law as to the liabilities and obligations of directors is much more satisfactory in theory than in practice, and that the best possible method of avoiding loss through wrongful or ill-judged acts of the

directors is to confine the membership of the board to men of known integrity and character.

§ 109. Resignation of Directors

A director is under no obligation to continue in the service of his corporation longer than he desires. Even though the statutes or by-laws provide that he shall continue in office until the end of his term, he may resign at any time and thereby terminate his official position.[15]

The effect of a resignation is governed by its terms. It may be tentative, requiring acceptance by the board before it is effective, or peremptory and effective as soon as delivered to the proper representative of the corporation.[16]

The resignation should, for purposes of record and proof, be in writing, but an oral resignation properly presented to the board of directors and recorded in the minutes as so presented, is sufficient. It is obvious, however, that an oral resignation is objectionable on account of its difficulty of proof. A peremptory resignation may be made effective at a future date. A tentative resignation may fix a future date on which it will be effective if accepted.

A peremptory resignation cannot be withdrawn after its formal presentation to the board, save with the consent of the board. A tentative resignation may be withdrawn at any time before its acceptance. (See Chapter LXXIX, "Resignations.")

§ 110. Removal of Directors

The directors have no power to suspend or remove a fellow member of the board. The stockholders have a common law power to remove directors for adequate cause, but such removals are not frequent. The cause must be good and capable of proof, charges must be preferred, a meeting must

[15] 3 Clark & Marshall on Corp., § 667 and cases cited; Briggs v. Spaulding, 141 U. S. 132 (1891); Will of McNaughton, 138 Wis. 179, 208 (1909).
[16] Manhattan Co. v. Kaldenberg, 165 N. Y. 1 (1900).

be called, and the accused be given a hearing. The whole procedure is troublesome, and it is usually preferable to await the expiration of an offending director's term rather than to attempt his forcible removal sooner.

In some states, however, the statutes extend this common law power of removal, and, wherever special provisions are permitted in the charter, the same end may be attained by proper charter provision. When thus given by the statutes or charter, the power of removal is usually summary, i.e., an objectionable director may be removed by prescribed procedure—usually by a two-thirds vote of the stock, but in a few states by a bare majority—at once and with or without cause. Under these circumstances the removal of directors is more frequent.

When the office of director has been usurped or is unlawfully held, and is claimed by a party who is not in possession, a writ of *quo warranto* will lie or an equitable action for possession may be instituted.[17]

§ 111. Vacancies on the Board

The stockholders alone have power to fill vacancies on the board, unless otherwise expressly provided by statute, charter, or by-laws. Such vacancies must therefore await the election of directors at the next annual meeting, or be filled by special election, unless the power of filling vacancies has been conferred upon the board.[18] It is advisable that the directors have this power, and in practice it is almost invariably given them.

Vacancies on the board may be caused by the death, removal, resignation, or disability of a director, or the failure of a director-elect to accept his office.[19] The continued absence

[17] Powers v. Blue, etc., Assn., 86 Fed. 705 (1898); People v. Powell, 201 N. Y. 194 (1911).

[18] *In re* Griffing Iron Co., 63 N. J. L. 168, 357 (1899); 2 Thompson on Corp., § 1083.

[19] Whittaker v. Amwell Nat. Bank, 52 N. J. Eq. 400 (1894); United Growers Co. v. Eisner, 22 App. Div. (N. Y.) 1 (1897).

of a director from meetings is not itself sufficient to vacate his position. If it is desired that such continued absence shall have this effect, the by-laws should so provide, specifying the exact number of consecutive absences from regular meetings or from regular and special meetings necessary to create a vacancy.

A board of directors may legally continue to act in spite of vacancies, provided enough remain to make up a quorum of the whole board. Less than a quorum of the board cannot fill vacancies unless expressly so empowered by charter or by-laws.

§ 112. Directors Holding Over

"If the directors shall not be elected on the day designated in the by-laws, or by law, the corporation shall not for that reason be dissolved; but every director shall continue to hold his office and discharge his duties until his successor has been elected."[20] This statement of the law taken from the New York statutes is also a statement of the common law, existing in practically every state of the Union.[21] A similar provision also usually appears in the by-laws.

The powers of directors who continue in office because of a failure to elect their successors are the same in every respect as before their term of office expired. They are directors both *de jure* (by right) and *de facto* (in fact), and their acts are valid.[22]

The smaller corporations relying upon this condition sometimes omit the annual meeting with its election of directors for years, thereby avoiding the formalities of the annual meeting. In such case the old board holds over indefinitely, and, duly empowered thereto by charter or by-laws, fills by vote

[20] Gen. Corp. Law, N. Y., § 28.
[21] State v. Bonnell, 35 Ohio St. 10 (1878); Appleton v. Am. Malting Co., 65 N. J. Eq. 375 (1903).
[22] 3 Cook on Corp., § 713; Kent Co., etc., Society v. Houseman, 81 Mich. 609 (1890).

of its own members any vacancies that may occur. As long as the stockholders do not protest, the practice is not legally objectionable. In New York the omission of the election of directors for eight years has been upheld.[23]

§ 113. Directors Dealing with Corporation

The subject of directors' dealings with their corporations is too extensive for full treatment here. A director occupies a fiduciary relation to his corporation and should as far as possible avoid any position in which his personal interest is adverse to that of the corporation. He may, however, speaking generally, make any contract with his corporation that is fair and to its interest. His contract is therefore not void but merely voidable, and if no stockholder objects will stand.[24] Also cases have arisen where a contract between a director and his corporation has been ratified by a majority of stockholders at a duly called meeting, and the courts have sustained the contract.[25] Also, if all the stock is owned by the directors and there are no creditors, a director may contract with his corporation at pleasure.[26]

In all cases where a director is personally interested in any particular contract or other matter to be acted upon by the board, he should withdraw from the room while the vote is being taken and his absence should be noted on the minutes. To be valid the action must be taken by a legal quorum exclusive of the interested party.[27]

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[23] Geneva Mineral Springs v. Coursey, 45 App. Div. (N. Y.) 268, 275 (1899).

[24] Fort Payne Rolling Mill v. Hill, 174 Mass. 224 (1899); Welch v. Bank, 122 N. Y. 177 (1890); Cont. Ins. Co. v. N. Y., etc., R. R. Co., 187 N. Y. 225 (1907).

[25] Nye v. Storer, 168 Mass. 53 (1897); Gamble v. Queens Co. Water Co., 123 N. Y. 91 (1890).

[26] McCracken v. Robison, 57 Fed. 375 (1893); Barr v. R. R. Co., 125 N. Y. 263 (1891).

[27] Curtin v. Salmon, etc., Co., 130 Cal. 345 (1900); Steele v. Gold, etc., Co., 95 Pac. (Colo.) 349 (1908); Schaffhauser v. Brewing Co., 218 Pa. St. 298 (1907).

CHAPTER XIV

OFFICERS

§ 114. General

The term "officers" is here applied to those permanent agents of the corporation appointed or elected—usually by the board of directors—as the direct representatives of the board and of the corporation. The directors themselves are at times and with legal correctness styled "officers," but to avoid confusion the term is, as a rule, employed in the present volume to designate those officials subordinate to the board. (See Ch. XXX, "By-Law Provisions Relating to Officers.")

The necessary officers of a corporation, sometimes termed the "executive officers," are the president, secretary, and treasurer. One or more vice-presidents are usual. In addition to these, other officers or agents are frequently appointed, as managing directors, general managers or superintendents, counsel, auditors, and special agents for particular purposes.

§ 115. Appointment of Officers

The stockholders have the original right to elect or appoint officers of their corporation, and in the absence of preventing statutes this power may be reserved to them. In practice, however, by express provision of the statutes, charter, or by-laws, the power of appointing officers is almost invariably vested in the board of directors.

The election of one person to two corporate offices is common, and is usually authorized by charter or by-law provision. If otherwise, the board still has power to combine any two or more official positions in one person if the duties of the combined positions do not conflict.[1]

[1] People v. Green, 58 N. Y. 295-304 (1874); 3 Cook on Corp., § 712.

The term for which corporate officials are elected is usually prescribed by proper charter or by-law provision, and seldom exceeds one year. As a matter of business policy such term should not be longer than that of the directors by whom the officials are elected. That is, if the directors are elected annually, the officers also should be elected annually so that each new board may appoint its own agents.

The appointment of managers, experts, or other specially skilled employees is, however, of a different nature. These are not so directly agents of the board, and contracts for their services extending over a term of years are frequently advantageous or even necessary to the corporation. Such contracts are entirely within the power of the board without special charter or by-law authorization.

Unless they resign or are removed in some manner, the corporate officials hold over after the expiration of their elective term, until they are relieved by properly elected or appointed successors.[2] This is frequently a statute, charter, or by-law provision, but, if otherwise, is a matter of common law. These officials have every power that they possessed before the expiration of their elective terms.

As the board elects and appoints officers, it has also the power to fill vacancies among them without specific authorization.

§ 116. Qualifications of Officers

The officers are the agents of the board of directors and of the corporation. Hence any one who may act as an agent is capable of acting as a corporate official, and, in the absence of prohibition, a married woman, a minor, an alien, or one of its own directors may be legally elected as an officer of the corporation.

[2] Mining Co. v. Abraham, 26 Ore. 282 (1894); Agricultural Soc. v. Houseman, 81 Mich. 609 (1890); Quitman Oil Co. v. Peacock, 81 S. E. (Ga.) 908 (1914).

Membership in the board is, as a rule, a necessary qualification for the president and vice-president of a corporation. They are almost invariably the presiding officers of the board, and when this is the case, the election of a president or vice-president not a member of that body might lead to difficult situations.

§ 117. Powers and Duties of Officers

The mere fact of election to office does not necessarily in itself confer any power or duties upon the officials of a corporation.[3] Custom or usage may have attached certain powers and duties to certain official positions, but the corporation may disregard this and vary the powers and duties of the different officers as seems to it best.

In general it may be said of corporate officials that, as agents of the corporation, they are governed by the general law of agency. Accordingly a corporate official has only those powers which are conferred upon him or are incidental to the exercise of these powers.

The different sources from which the powers of corporate officials are derived are, in rank of their authority, (1) the statutes of the state, (2) the charter, (3) the by-laws, (4) resolutions of directors, and (5) usage.

Statutory provisions affecting corporate officials are few. The charter likewise but seldom contains provisions affecting the officers of the corporation, though occasionally such provisions are inserted therein for the sake of permanence. The by-laws, however, usually prescribe the official powers and duties with fulness, and the directors, subject to the provisions of the higher authorities referred to, confer such other proper official powers and prescribe such other official duties as they see fit.

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[3] R. R. Co. v. Bayne, 11 Hun (N. Y.) 166; affd., 75 N. Y. 1 (1877); Cushman v. Cleveland, etc., Co., 84 N. E. (Ind.) 759 (1908); Emmet v. Northern Bank, 173 App. Div. (N. Y.) 840 (1916); Marquisee v. Ins. Co., 211 Fed. 903 (1914).

Beyond all these, it will usually be found that the officers transact certain routine business[4] and perform certain duties as a matter of custom, and their acts are valid and binding upon the corporation, even though not specifically authorized.[5]

Also it may be stated generally that whenever the directors permit an officer to exercise apparent authority in the corporate affairs or transactions, the corporation is bound thereby as to third persons as fully as if such officer had been duly authorized.[6]

Beyond this, corporate officers not infrequently act clearly without the bounds of their authority, relying upon ratification of their acts by the board of directors later. If so ratified, the corporation is bound and the officials are absolved from all responsibility for their *ultra vires* acts.[7] If, however, the official action is not ratified, the corporation is not bound and the officers are personally liable for their acts.[8]

The validity of an officer's acts depends entirely upon his authority and not on the place in which the authority is exercised.[9] Therefore, when in the proper discharge of his duties, his acts are as effective in one place as another and equally binding upon the corporation.

The board may temporarily delegate the powers of an official to another person, provided such delegation is reasonable and only for such length of time as may be actually necessary to conserve the interests of the corporation. An officer cannot delegate his powers to another officer in any material matter, even temporarily, unless specially authorized thereto by the by-laws or by action of the board.[10]

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[4] Fitzgerald, etc., Co. v. Fitzgerald, 137 U. S. 98 (1890).

[5] Ins. Co. v. McCain, 96 U. S. 84 (1877); Story on Agency, §§ 126, 127.

[6] New York & New Haven R. R. Co. v. Schuyler, 34 N. Y. 30 (1865); 3 Clark & Marshall on Corp., § 708; Louchheim v. Bldg. Assn., 211 Pa. St. 499 (1905); Rankin v. Tygard, 198 Fed. 795 (1912).

[7] Rolling Mill v. R. R., 120 U. S. 256 (1886); Nims v. Boys' School, 160 Mass. 177 (1893); Topolewski v. Plankinton Packing Co., 143 Wis. 52 (1910).

[8] Malone v. Pierce, 231 Pa. St. 534 (1911); Falls City Lumber Co. v. Watkins, 53 Ore. 212 (1909).

[9] Hastings v. Ins. Co., 138 N. Y. 473 (1893).

[10] Caldwell v. Life Assn., 53 App. Div. (N. Y.) 245 (1900). As to when corporation will be bound, see Emerson v. Hat. Co., 12 Mass. 237 (1815); also Luttrell v. Martin, 112 N. C. 593 (1893).

§ 118. Liabilities of Officers

An officer contracting for his corporation within the limits of his authority is merely a corporate agent, and, if not guilty of fraud or deceit, does not bind himself and cannot be held personally liable in any way. If, however, he exceeds his authority he renders himself personally liable,[11] unless the corporation later ratifies the unauthorized action,[12] in which case he is released.

Officers are bound to use ordinary care and diligence in the conduct of the corporate business and are therefore liable for any losses caused by their neglect, mismanagement, or wrongdoing in the discharge of their official duties,[13] though not for an error of judgment.[14]

An officer is also personally liable for any wrong he does on behalf of his corporation, such as sending out false and deceptive reports, statements, prospectus, etc., even though the corporation is also liable.[15]

In many states statutes exist prescribing penalties for various misdeeds of corporate officials. Thus in New York, neglect to make proper entries in the stock book, or to exhibit this book on request to those entitled to its inspection involves a penalty of $50 and of resulting damages; rendering a false report involves liability for all resulting damages; loaning corporate funds to a stockholder or allowing him to withdraw his investment in any way renders officers and directors personally liable for all debts of the corporation until the amount is returned, while the penalty for falsifying accounts or erasing or destroying the corporate records is the same as that for forgery.

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[11] See citations in footnote 8.

[12] See citations in footnote 7.

[13] 3 Cook on Corp., § 702, and cases there cited; McEwen v. Kelly, 140 Ga. 720 (1913); United Zinc Cos. v. Harwood, 216 Mass. 474 (1914); Childs v. White, 158 App. Div. (N. Y.) 1 (1913).

[14] Briggs v. Spaulding, 141 U. S. 132 (1890); People v. Equit., etc., Society, 124 App. Div. (N. Y.) 714 (1908).

[15] Cowley v. Smyth, 46 N. J. L. 380 (1884); Morgan v. Skiddy, 62 N. Y. 319 (1875).

§ 119. De Facto Officers

A *de facto* officer is one actually in possession of an office and exercising its powers and duties by virtue of some other authority or right than that of a regular, unquestioned election or appointment. He must be "distinguished on the one hand from a mere usurper of an office, and on the other hand from an officer *de jure*,"[16] i.e., one holding his position by legal right. It not infrequently happens that the results of an election are disputed or that an election is not held. In the first case if the officers claiming election enter upon their official duties, or in the second case if the old officers continue in office, the acting officials are *de facto* officers, and, until ousted or superseded, their official acts are legal and binding upon the corporation.

Speaking generally it may be said that anyone connected with a corporation who is publicly allowed to act as its officer or agent is a *de facto* officer. Persons dealing with the corporation cannot usually investigate and ascertain whether those who purport to represent it are legally appointed. The law therefore holds that the acts of these *de facto* officers are binding on the company even though they have no legal right to the position they pretend to hold.

§ 120. Removals and Resignations

When an officer is elected for a definite term and accepts the office, a contract has been made for that term, and, unless power has been given the board by express provision of statutes, charter, or by-laws to remove the corporate officers at pleasure, the incumbent can be legally removed only for cause.[17] If a removal is to be made, the cause must be such as will justify breaking the contract with the offending official, charges must be brought against him, and he must be allowed

[16] Waterman v. Chicago, etc., R. R. Co., 139 Ill. 658-665 (1892); Merchants' Bank v. Citizens' Gas Light Co., 159 Mass. 505 (1893).
[17] State v. Kuehn, 34 Wis. 229 (1874).

an opportunity to defend himself.[18] If removed without cause, his official status ceases but the corporation is liable to him for breach of contract.[19]

In some few states the statutes give the directors power to remove officers at pleasure. Elsewhere it may be given them by charter or by-law provision.[20] Such provisions are usually desirable as the board is responsible for the proper conduct of the corporate business and should have power to remove an objectionable official without the necessity of a formal trial. When by-laws are adopted giving the directors power to remove officers without cause, they do not authorize the removal of officers already elected, but are effective as to officers elected thereafter.

Under the usual conditions of election, a corporate officer may resign at will,[21] unless he has entered into some distinct agreement to serve the corporation for a fixed period. It follows that acceptance of the signature of an officer is not necessary unless required in the charter or by-laws.[22] His resignation should, as a rule, be in writing, be phrased to meet the exact end in view, and be delivered to the secretary,[23] though an oral resignation in open meeting is sufficient, especially if followed by acceptance by the board.[24] It has been held that all the corporate officers cannot resign at once for the purpose of throwing the corporation into the hands of a receiver,[25] or to free themselves from their obligations in regard to the custody of the corporate property.[26]

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[18] State v. Adams, 44 Mo. 570, 585 (1869); State v. Kuehn, 34 Wis. 299 (1874).
[19] *In re* Griffing Iron Co., 63 N. J. L. 168 (1899); Brindley v. Walker, 70 Atl. Rep. (Pa.) 794 (1908).
[20] State v. Adams, 44 Mo. 570, 585 (1869); Darrah v. Ice & Storage Co., 50 W. Va. 417 (1901); Douglass v. Merchants' Ins. Co., 118 N. Y. 484 (1890).
[21] Yorkville Bank v. Zeltner B. Co., 80 App. Div. (N. Y.) 578 (1903); Van Amburgh v. Baker, 81 N. Y. 46 (1880).
[22] Fearing v. Glenn, 73 Fed. 116 (1896); Will of McNaughton, 138 Wis. 179, 208 (1909).
[23] Manhattan Co. v. Kaldenberg, 165 N. Y. 1 (1900); Noble v. Euler, 20 App. Div. (N. Y.) 548 (1897).
[24] Briggs v. Spaulding, 141 U. S. 132-152 (1891); Fearing v. Glenn, 73 Fed. 116 (1896).
[25] Zeltner v. Brewing Co., 174 N. Y. 247 (1903).
[26] Yorkville Bank v. Zeltner B. Co., 80 App. Div. (N. Y.) 578 (1903).

BOOK II

CORPORATE ORGANIZATION

Part V—The Charter

CHAPTER XV

GENERAL CONSIDERATIONS

§ 121. Nature of Charter

The foundation of the corporation is a formal written grant or authorization from the state. This instrument, originally known as the charter, is now usually designated by the statute laws of the various states as the certificate of incorporation or the articles of association. From a legal standpoint there is no distinction between these different names. As a matter of convenience the term charter is generally employed in the present volume. The charter may be granted by a particular state, or by the general government as in the case of national banks and certain other corporate organizations. It is a recognized principle that all statutory laws of the state of incorporation governing or regulating corporations become a part of the charter.[1]

Formerly every charter was created, or authorized, by a separate legislative act. Charters, termed special charters, are still granted in some states by act of legislature for special corporations, but the greater number of corporations are organized under state laws of general application. (See § 124.)

All corporations have certain common law powers, such as the right to sue and be sued under the corporate name, the right to contract and to use the corporate seal. In addi-

[1] Ellerman v. Railway Co., 49 N. J. Eq. 217 (1891); Bixler v. Summerfield, 195 Ill. 147 (1902); Westport Stone Co. v. Thomas, 175 Ind. 319 (1910).

tion they have any general powers granted by the statutes and the special rights granted by their respective charters, such as the use of the particular name, the right to carry on the special business and to have a certain capital stock. They also have such incidental powers as are necessary to render these express powers effective. If any further corporate powers allowable under the laws of the state of incorporation are desired, they must be secured by proper amendment of the charter. Their exercise otherwise is *ultra vires,* i.e., beyond the powers of the company.

As the charter is usually a very formal instrument, and the procedure for its amendment is also formal and usually troublesome, it is important that all desired purposes and powers should be stated with clearness and fullness in the original charter application.

The powers and privileges conferred upon a corporation by its charter are only such as are allowable under the laws of the state of incorporation. Ordinarily any provisions of a different tenor would be refused or stricken out of the charter application by the state officials. Occasionally it happens, however, through official ignorance, inadvertence, or indifference, that powers and privileges illegal, or not permissible, are passed and apparently granted by the charter of a corporation. Such appearance is deceptive. The corporation is empowered by its charter just so far as that instrument is in accord with the law of the state and no further. The charter is not and cannot be superior to the law, and is absolutely ineffective just so far as it goes beyond.

It must be noted that the ordinary business corporation does not in any proper sense of the word receive a franchise, as the granting of the charter does not give it any powers that will not be freely given to any other incorporation upon like application. A modern charter does not grant a franchise.[2]

[2] 1 Machen on Corp., §§ 19, 20; 2 Morawetz on Corp., § 923.

§ 122. Classification

Charters are divided into two important classes by the general division of corporations into stock and non-stock or membership corporations. Charters for membership corporations are not treated specifically in the present volume.

Beyond this general division, stock corporations and the charters creating them may be divided into three important classes as follows:

1. Business corporations, organized to conduct an ordinary mining, mercantile, manufacturing, or other private business.
2. Public utility corporations, organized to undertake some public function, such as the supply of heat, light, power, or water, or the construction or operation of a railway, a telephone or telegraph system.
3. Financial corporations, as banks, trust companies, building associations, and insurance companies.

The corporations of each of these classes are created by charters differing from those of the other classes in form and terms, though all conform to the general principles governing charters. The characteristic features of each of these classes of corporations are as follows:

1. Business Corporations

This term is used to designate corporations organized to conduct those various forms of private business not subject to special regulations and restrictions in the interest of the public. All corporations for mining, manufacturing, and mercantile pursuits are included under this head.

Business corporations are, as a rule, chartered in each state under general, uniform laws and forms, have no special privileges, and, when incorporated, are allowed to pursue their corporate ends almost as freely and as simply as would

a private individual or firm under the same circumstances. The majority of existing corporations belong to this class and the great mass of corporate law and decisions applies to them primarily. For the other classes of stock corporations there are special laws, special limitations, and in some cases special privileges.

2. Public Utility Corporations

Public utility or public service corporations are those organized for the purpose of securing and operating under some franchise of a public nature, which confers upon such corporations rights or privileges which other citizens and private corporations do not enjoy. Usually these franchises carry with them certain rights of way, or condemnation powers to secure such rights granted by the state under its power of eminent domain.

An ordinary private corporation enjoys no exclusive franchise of this nature, and, generally speaking, any other body of citizens may incorporate for exactly the same purposes and carry on exactly the same kind of business. (§121.) A company organized to operate a public utility must, however, have special rights and powers affecting the public welfare or convenience, and usually another similar corporation would not be granted these identical rights and powers while the former corporation was in active existence. For instance, a gas company must have the right to tear up streets in order to lay and repair its pipes. The ordinary citizen or corporation has no such right. If such right were granted to one company, the same right in the same territory would not properly be granted to another company. Should such double concession be made, it would be but a short time until, in obedience to well-known economic laws, the two competing companies would combine.

This peculiarity is true of all classes of public utility corporations. They enjoy franchises that cannot be granted

indiscriminately, and that tend inevitably to monopoly. They enjoy these special privileges for the purpose of supplying certain public needs that must be supplied uniformly. They cannot be given the liberty to make prices and conditions that obtains in the conduct of a private corporation. Hence, the laws under which they receive charters should guard against the indiscriminate bestowal of such rights and should carefully regulate charges and methods.

In many states the charters of public utility corporations are granted only by special acts of legislation; in others, commissions pass upon such applications and decide whether the public welfare requires the issuance of the desired charter; while in other states such corporations are chartered under the provisions of general laws.

3. Financial Corporations

Experience has shown that it is unsafe to allow irresponsible parties to incorporate and conduct banks, trust companies, savings institutions, and similar associations dealing with the funds of others. Hence, institutions of this sort are now so hedged about with restrictions and limitations that, in a measure at least, their conduct is confined to reputable and responsible people. Their safety is also partially assured by stringent rules as to the payment of stock subscriptions in cash before business is commenced, and as to the liability of their stockholders thereafter. In national banks and in many state banks a stockholder's liability is equal to the face value of his stock, thus nominally placing $200 behind each $100 of stock as security for the deposits and other liabilities of such institutions. In many cases this extra $100 is paid in and used as surplus.

Usually charter applications for financial corporations must be approved by some department or official of the state; and after incorporation their affairs are subject to the inspection and supervision of the state officials, and their officers

are required to make regular reports of their business and financial condition. National banks are under the jurisdiction of the United States laws and are not subject to this supervision and regulation from the authorities of the state in which they operate.

Speaking generally, both public utility corporations and financial institutions chartered by the state are subject to the usual statute law regulating stock corporations, and in addition to such special legislation as may affect them. If doing business in other states, they would be governed by the local regulations affecting such foreign corporations.

§ 123. Charter Details

When a corporation is to be organized, all the important features which are peculiar to the new corporation and which are not secured to it by the common law or are necessarily incident to incorporation, should appear in its charter. These are usually the name, purposes, duration, location, capitalization and the details thereof; also in some states the number of directors and the names of those who are to act for the first year, and any desired special provisions that can be made a permanent part of the corporate organization under the laws of the state of incorporation. Temporary or less important details may be left for by-law or other regulation, but all matters of permanence or importance should appear in the charter as far as possible. The statutes usually require the main features outlined above to appear in the charter. (See Chapter LXI, "Charter Forms.")

In New York, New Jersey, and some other states, special provisions may be inserted in the charter for the regulation and conduct of the corporate business and affairs and for any proper limitations on the powers of its officials. This leaves wide scope for the insertion of such provisions and many varying arrangements result from this freedom.

§ 124. Application for Charter

Special charters are prohibited by constitutional provision in a number of states. Where not prohibited they are secured by application to the legislature. In such case the charter application is put in the form of an act declaring that certain named parties and their successors are a body corporate for the purposes enumerated. This act, if passed by the legislature, becomes the charter of the company and is its sole authority for existence and operation.

The granting of special charters is a source of grave abuses, and in many states, as already said, is prohibited by constitutional provisions. In other states, however, as in New York, such charters are still granted, and charters may be secured either under the general corporation laws, or, where sufficient influence exists, by direct appeal to the legislature.

In all the states general laws have been passed prescribing the method whereby charters may be secured. These laws are modified by special additional requirements in the case of financial and public utility corporations. Under the provisions of such general laws, when due and proper application is made with payment of the proper fees, the Secretary of State must issue a charter in accordance with the terms of the application, or, if actual issuance of the charter is not required, the official acceptance and filing of the application, *ipso facto,* authorizes the parties to organize as a corporation.

This is the usual procedure under which the great majority of modern business corporations come into existence. It is a matter of right, not of favor, and is available equally for all qualified persons who choose to comply with the necessary formalities and pay the required fees.

CHAPTER XVI

INCORPORATORS

§ 125. Who May Incorporate

Corporations are creatures of the law. They derive their right to existence either from direct legislative enactment or from the general laws under which they are formed. Therefore only those may incorporate who are expressly authorized thereto by these special acts or under these general laws. In each state the status must be consulted in order to ascertain definitely just who may participate in any proposed incorporation.

Usually the statutes authorizing incorporations employ the term "persons" or "natural persons" in prescribing who may incorporate. This wording excludes a firm, a corporation, or any one acting in a representative capacity. Any of these might hold stock in the corporation when organized, but could not legally act as an incorporator.[1]

As the charter is in effect a contract, a person unable to contract cannot properly act as an incorporator. This is a matter of common law and excludes minors, persons of unsound mind and others similarly incompetent to contract. Under the old common law it would also exclude married women, but this disability has been generally removed and married women frequently act as incorporators.

In some states one or more of the incorporators must be citizens of the state of incorporation. Unless this is expressly prescribed, any person otherwise competent can act, whether a citizen of the state or not. Incorporators need not even be

[1] Schwab v. Potter, 194, N. Y. 409, 416 (1909); Converse v. Emerson, Talcott & Co., 148 Ill. App. 604 (1909).

citizens of the United States unless expressly required by the statutes. In New York, at least one of the incorporators must be a resident of the state, and two-thirds of the total number must be citizens of the United States. In New Jersey none of the incorporators need be citizens either of the state or of the United States.

It must be borne in mind that each state has the entire right to impose any qualifications on incorporators that its legislators deem desirable, and that there is no appeal from such statutory requirements. Usually, however, the matter is not of great importance, as, if any of the proposed incorporators are barred by statute requirements, a substitute may be appointed who is qualified, and who will act up to such point as is necessary or desirable and then transfer his subscription and all his rights to the party for whom he has been acting. This utilization of "dummy" incorporators is a common procedure. (See § 129.)

§ 126. Number of Incorporators

In every state the minimum number of incorporators is prescribed by statute. In most states this minimum is three, though in a few states five are required. No maximum number is designated in any state, this feature being a matter of no importance from the standpoint of the state.

As a general rule it is advisable to incorporate with the minimum number of incorporators permitted by the statutes. Usually each incorporator must sign and acknowledge the charter application, and must either sanction or participate in the first meeting, and these proceedings are much facilitated by a small number of incorporators. At times different interests must be represented in an incorporation and the subsequent organization, and a considerable number of incorporators is therefore unavoidable, but without some such reason the minimum number is to be preferred.

§ 127. Functions of Incorporators

The incorporators furnish the nucleus about which the new corporation is formed, and are the active agents in bringing it into existence. They are essential participants in the formalities incident to the creation of the corporation. They must usually sign and acknowledge the charter and are generally required to be subscribers to the stock of the corporation. They call and conduct the first meeting. The organization of the corporation is usually entirely in their hands, though in case they are not the real parties in interest, i.e., are "dummy" incorporators acting for others, the organization and first proceedings will be prescribed for them in advance.

It will be seen that the only necessary function of the incorporators is to figure in certain formalities incident to the formation of the new corporation. They may be the real parties in interest who will remain with and own stock in the new corporation, or they may be "dummy" incorporators, called in merely as a matter of convenience or for more cogent reasons, without interest in the corporation beyond their perfunctory subscription for one or more qualifying shares—an interest that is usually assigned to the real parties in interest so soon as the corporation is once organized and ready to begin its operations. (See § 129.)

§ 128. Incorporators as Stockholders

It is usual for incorporators to be subscribers for one or more shares of stock in the proposed corporation. In most of the states, such subscription is either required, or it is assumed that such subscription will be made. If not either directly or inferentially required by the statutes, such subscription is not essential.

When an incorporation is effected with incorporators who do not desire, or are not desired, to remain as permanent stockholders, it is usual, after the organization has been completed,

for the incorporators to assign their subscription rights or their stock to those parties who are to be the real owners of the corporation. These latter assume the obligations of the incorporators on the assigned subscriptions of stock, and, if the transaction is acquiesced in by the corporation, it is then legally complete and the original incorporators are in most states discharged from any subscription obligations either to the corporation or to corporate creditors.[2]

§ 129. Dummy Incorporators

As has been stated, any competent person may join in an incorporation without any material or permanent interest in the matter, and such non-interested or "dummy" incorporators are frequently employed. Sometimes this is done where the real parties in interest do not deem it advisable to appear as incorporators; sometimes of necessity because of the absence of the principals; and sometimes purely as a matter of convenience, the real parties concerned being disinclined or too busy to undertake themselves the technical duties of incorporators.

In such cases the dummy incorporators execute the charter and organize the corporation, usually subscribing for the smallest number of shares that will satisfy the statute requirements, and carrying the organization to such point as the real parties in interest or their attorneys indicate. The "dummies" then assign their subscription rights or stock, resign any official positions they may hold in the new corporation, and step down and out.

Such an incorporation, if properly conducted, is entirely legal, and the method is that pursued in the formation of almost all the larger corporations and combinations. The proceedings are, as a matter of course, supervised and ordinarily conducted by the attorneys of the parties really interested,

[2] 1 Cook on Corp., § 255 and cases cited.

these attorneys dictating all that is done and seeing that the interests of their clients are properly conserved. The proceeding is carried as far as the conditions render advisable before the dummy incorporators make way for their principals. Usually they fully complete the organization of the corporation, electing themselves directors and officials, or perhaps electing to the official positions the parties who are to be permanent incumbents. Meanwhile they usually take action of the greatest moment to the future of the new organization.

The organization of the United States Steel Corporation was effected in this way. Three incorporators were provided, each of whom subscribed for ten shares of stock out of a total capitalization of but $3,000. As soon as the organization of the new corporation was completed, the incorporators were retired, the real parties in interest came in, and the capitalization was increased to $1,100,000,000.

In such cases the incorporators are usually the junior counsel and clerks in the offices of the attorneys having the incorporation in charge. As stated, if the incorporators are properly qualified and the proceedings are conducted in accordance with the statutory requirements, there is no question as to the legality of the use of dummy incorporators, even where properties of large value are taken over for the corporation by these irresponsible parties.

CHAPTER XVII

THE CORPORATE NAME

§ 130. How Secured

The name of the proposed corporation must be set forth specifically in its charter application. This name, so soon as the application is allowed, becomes the name and property of the new corporation. In the state of incorporation the right to such name is exclusive.

If the desired name were the same as that of some other domestic corporation or foreign corporation licensed to do business within the state, or so nearly the same as to cause confusion, that fact alone would be ground for the rejection of the charter application.

But few statutory restrictions exist in regard to the corporate name. The prohibition against the adoption of a name similar to that of a corporation already doing business under the state laws is the most important. In some states the prefix "The" must be used to introduce the corporate appellation; in some states "Corporation," "Company," "Association," or some other word expressing the idea of corporate association must be used in the corporate name. In some few states, the word "Incorporated" or "Limited" must follow the corporate designation.[1] In New York every corporation must use such word or words, abbreviations, affix, or prefix as will distinguish it from a natural person, firm, or copartnership.

In most of the states insurance and moneyed corporations, and in many states co-operative corporations, must be organized under special statutes, and in these states the statutes

[1] 1 Machen on Corp., § 449 and notes.

usually provide that the corporation not organized under the special laws shall not use the words "Trust," "Bank," "Insurance," "Co-operative," and like words in their corporate titles.

The state authorities would have no right to refuse a charter application on the ground that some foreign corporation not licensed by the state is using the selected name. In such event the charter application, if no other objection existed, must be allowed, leaving the right to use the name to be settled between the two corporations.

§ 131. Selection of Name

The selection of the corporate name is frequently a matter of considerable importance, though usually governed by business considerations rather than legal rules. As a matter of business, a name should be selected that is distinctive, not too long, and, if possible, expressive of the business to be done by the corporation. The selected name should not be fraudulent or misleading, nor should it infringe on the rights of others.[2]

In the incorporation of a partnership, the general usage is to retain the partnership name with only such changes as will indicate the corporate organization.[3]

In most states great latitude is allowed in the selection of the corporate name, the prohibition against conflicting names being practically the only restriction. If not required by statute, the use of the prefix "The" is to be avoided as unnecessarily lengthening the name and producing a peculiarly awkward effect in legal instruments when the name is used following the word "said," as is frequently the case.

Hackneyed names such as "Standard," "Excelsior," "Union," etc., as well as much-used geographical names, are to be avoided, both as a matter of taste and business. No

[2] 1 Machen on Corp., § 450; Von Thodorvich v. Beneficial Assn., 154 Fed. 911 (1907).

trade-name rights can ordinarily be secured in such well-worn designations.[3] But the fact that the distinctive and similar feature of two names consists of a combination of geographical names does not deprive the first user of the right to protection.[4]

§ 132. Right to Corporate Name

One important object of incorporation is to secure permanence, and the corporate name is an almost essential element of this desired commercial continuity. Once established, the name is the embodiment of the good-will of the enterprise and has a value in accordance. If the corporation is properly managed and is successful, this value is frequently very considerable. In some instances it is the chief asset of a prosperous business.

The corporation's right to its name is th[illegible]o any other trade-mark or trade-name possessed by it, and is generally more easily established. If the name is used by other parties without authority, such use may be stopped by injunction, and, if damage can be shown, an action will lie against the offending parties.[5] The same rule applies whether the infringement is by another corporation or by the adoption of a trade-name by an individual or partnership.[6] A corporation cannot take the name of an existing copartnership, where this would result in injury to the partnership. If it does take such a name it may be enjoined.[7]

As has been stated, there is usually no statute restriction against the adoption of the name of a foreign corporation

[3] Columbia Mill Co. v. Alcorn, 150 U. S. 460 (1893); Corning Glass Works v. Corning Cut Glass Works, 197 N. Y. 173 (1900).
[4] Kayser & Co. v. Italian Silk Underwear Co., 160 App. Div. (N. Y.) 607 (1914); British-American Tobacco Co. v. British-American Cigar Stores Co., 211 Fed. 933 (1914).
[5] Higgins Co. v. Higgins Soap Co., 144 N. Y. 462 (1895); Corning Glass Works v. Corning Cut Glass Co., 197 N. Y. 173 (1910); Salvation Army v. Am. Salvation Army, 135 A. D. (N. Y.) 268 (1909).
[6] German-Amer. Button Co. v. Heymsfeld, 170 App. Div. (N. Y.) 416 (1915).
[7] Pettes v. Am. W. C. Co., 89 A. D. (N. Y.) 345 (1903).

by a domestic corporation if such foreign corporation has not been licensed to operate in the state. The allowance of such name would not, however, give the new corporation an unquestioned right to its use. If the older corporation could show that it had a trade right in the name, and that the use of the name by the new corporation would be injurious to this right, and would permit it to compete unfairly, the new corporation might be enjoined from the use of such name, and, if the injunction should be sustained, would be compelled either to secure a new name by due and formal procedure or to discontinue its operations.[8]

In New York a foreign corporation will be refused admittance to the state on the ground that another corporation is doing business under the same or a similar name; but in North Carolina, under a ruling of the Attorney General, foreign corporations will not be excluded from the state because another corporation is already doing business under the same name.[9]

Where confusion in delivery of mail results from similarity of corporate names, the courts favor the corporation that first lawfully used the name.[10]

§ 133. Changing the Corporate Name

Occasionally it becomes necessary or expedient to change the corporate name. It may be that the use of the name first adopted is prevented by injunction, or new interests may have come in, that as a matter of business policy must be represented in the corporate name, or possibly the corporation has been unsuccessful or has achieved a bad reputation, and the adoption of a new name is thought desirable. In any such case, the name may usually be changed but only with the permission and sanction of the state. In many states the

[8] 1 Machen on Corp., § 459; Benevolent Order of Elks v. Improved Benevolent Order, etc., 205 N. Y. 459 (1912); Hoevel Sandblast Machine Co. v. Hoevel S. M. Co. of N. Y., Inc., 167 App. Div. (N. Y.) 548 (1915).

[9] Atty. Gen.'s opinion, Biennial Report, 1913-14, p. 92.

[10] Central Trust Co. v. Central Trust Co. of Ill., 149 Fed. 789 (1906).

change of name must be secured by an amendment to the charter, which is a more or less troublesome operation according to the statutory requirements of the particular state. Other more or less troublesome proceedings obtain in different states, as in New York where formerly the only method of changing the corporate name was by formal court proceedings.

The formalities incident to a change of corporate name are so great that in some cases it is simpler and no more expensive to organize a new corporation and transfer to it the assets of the existing corporation, than to take the time and trouble incident to a change of name by the regular procedure. In such a case, from the legal standpoint the old company has ceased to exist and a new company has become into existence. A mere change of name, on the other hand, does not affect the identity of the corporation.[11]

[11] Allen v. M. E. Church, 127 Iowa 96 (1905); N. B. Lumber Co. v. Sims & White, 157 Ala. 595 (1908); Carlon v. City Savings Bank, 82 Neb. 582 (1908).

CHAPTER XVIII

THE CORPORATE PURPOSES

§ 134. General

An individual or firm may do anything or engage in any form of business not prohibited by the laws. A corporation, on the contrary, may do only those things and engage in those businesses permitted it by the law and set forth in its charter. This renders it important that the charter should clearly and fully empower the corporation to do all those permissible things that may be necessary in its operations.

Usually the general corporation laws in each state specify the purposes for which corporations may be organized. In some states these purposes are limited to certain classes of pursuits, and corporations cannot be formed for purposes not specifically included. Mining and manufacturing corporations are authorized in all states. In most states the laws specify mercantile and trading corporations as well. Some states go still further and broadly authorize the formation of corporations for "any lawful business," "any lawful industry or pursuit," or for "pecuniary profit."

Under these latter clauses it would be difficult to discover any legitimate calling or pursuit that could not be undertaken by a corporation. The tendency of the present day is towards liberality in this respect and the few limitations that do exist are gradually being removed.

§ 135. Single Purpose

Formerly the rule was to organize corporations for a single purpose, as to mine for copper, to manufacture shoes,

or to conduct a trading business in some specified line. The authorization for this one purpose would, as a matter of course, carry the right with it to do all things necessary or proper to effect that purpose, but nothing further. If another line of business were to be taken up, a new corporation must be organized, as the powers of the old corporation could not be extended to cover the new pursuit. That is, if the members of the copper mining company wished to mine for the precious metals also, they could not secure specific authorization thereto for the old company, but must organize a new company for the purpose.

This rule is now almost abrogated. In a few states it is still the law and a corporation will not be chartered for more than one purpose, but generally a corporation will be empowered for as many legitimate purposes as may be included in the charter application. In some few cases, however, it is still advantageous to confine the corporate activities to one specific purpose. For instance, if a partnership is incorporated, it may be advisable to restrict it to the purposes of the business already under way. This would prevent any subsequent diversion of the corporate activity and resources into other and possibly dangerous channels. The corporation could conduct the one business and that alone. It would have no power to venture into new and untried fields.

§ 136. Comprehensive Purposes

At the present time the tendency in corporate organization is towards comprehensive purposes—purposes that will permit the corporation to undertake and operate any line of business, in any part of the world, and under any conditions. It is the natural desire to secure all powers and privileges that may be had—not that they are all needed or are to be exercised, but unforseen opportunities may occur when these powers will be required. Incorporators are pleased with

these extensive arrays of possible activities, investors and interested parties generally expect them, and, as their inclusion is a matter of little difficulty, nearly all modern charters enumerate almost every conceivable branch of business and every kind of enterprise allowable under the statutes.

In some cases this has been carried to an absurd extreme, but in general the practice has its advantages. There is no good reason why corporations should not have the same free range of business activities possessed by the individual or firm, and the effort of the present day is to approximate as nearly as may be to this ideal.

It is to be noted, however, that this end could be attained with equal efficiency and with much less trouble and verbosity by a few general statements of comprehensive scope. In most cases all the purposes of the most elaborately extended charter could be obtained in their full force and efficiency by a few well-turned phrases.

§ 137. Illegal Purposes

No state of the Union allows the organization of a corporation for illegal or immoral purposes. Where state officers inadvertently, or by intent, allow charters for such purposes, the authorization of these charters is void and ineffective and will not protect the stockholders from any penalties and liabilities that would be visited upon the members of a partnership engaged in similar undertakings.

This would apply to any business, occupation, or organization in direct violation of the laws of the state of incorporation, such as lotteries, gambling, and combinations in restraint of trade.[1]

Apart from these manifestly illegal or immoral undertakings, any purposes not allowed to corporations under the

[1] Peabody v. Gas Trust Co., 130 Ill. 268 (1889); McGrew v. City Produce Exchange, 85 Tenn. 572 (1886).

laws of the state are illegal. A charter for any such purpose, even if allowed by the state officials, would be ineffective and the stockholders would be held as partners in case of the insolvency of the enterprise. This does not often happen at the present day, as most of the states allow incorporation for all proper purposes and the possibility exists only in those states where corporate purposes are still restricted.[2]

Also it is to be noted that if some of the purposes are legitimate and proper and some unauthorized, the charter is good as to the legitimate portions but is held non-effective and non-existent in those portions unauthorized or in conflict with the laws. The laws cannot be added to or be overridden by a charter provision.[3]

§ 138. Things "Ultra Vires"

Things otherwise legal but not specified, or implied, among the charter powers of the corporation are beyond its powers, or *ultra vires.* Contracts made in pursuance of such unauthorized ends cannot be enforced against others, although the corporation itself is usually bound. Directors and officers may make themselves personally liable either to the corporation, to its stockholders,[4] or to third persons, for involving the corporation in such transactions.[5]

Both creditors and stockholders have the right to object to any action of the corporation exceeding its legal powers. If, however, the stockholders assent and there are no creditors, there is no one to object to the exercise of powers not authorized by its charter, and the corporate powers may be exceeded without danger to the officers and directors.

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[2] Amer. Trust Co. v. R. R. Co., 157 Ill. 641 (1895); Oregon R. R. Co. v. Oregonian Ry. Co., 130 U. S. 1 (1888); Johnson v. Northern Trust Co., 265 Ill. 263 (1914).

[3] Peabody v. Gas Trust Co., 130 Ill. 268 (1889); Straacke v. Routledge, 175 S. W. (Tex.) 444 (1915).

[4] Greenfield Savings Bank v. Abercrombie, 211 Mass. 252 (1912); McKinnon v. Morse *et al.*, 177 Fed. 576 (1910).

[5] 3 Clark & Marshall on Corp., § 744d. See, however, Linkhauf v. Lombard, 137 N. Y. 417 (1893).

Owing to the broad powers that are now usually granted, the doctrine of *ultra vires* has much less importance than formerly. A modern text-book says:

"The old theory of a corporation was that it could not legally do anything in excess of its express or implied powers. But the modern view is that a private corporation may, if all its stockholders assent and if creditors are paid. Public policy does not require business corporations to confine themselves strictly within the limits of the words of their charters."[6]

[6] Cook on Corp., § 3. See also 64 L. R. A., 366 *et seq.* on implied powers of corporations.

CHAPTER XIX

STOCK CLAUSES

§ 139. General

In most states the capital stock of a corporation and the divisions and general features of this capital stock must be stated in, and are fixed by, the charter. In a few states, stock with preferences or other special features may be issued after the allowance of the charter, by specified action of the stockholders, but as a general rule everything relating to the stock is fixed once for all by the charter and may be changed thereafter only by an amendment of that instrument.

Usually the charter states the full amount of the capital stock, its division into common and preferred stock if such division exists, the number of shares into which it is divided, and the par value of each share. The par value is usually the same for all the shares, though not necessarily so, unless required by statute as in California. The par value of the common stock might be fixed at $10 per share, while the par value of the preferred stock was fixed at $100. Generally such variations of the par value are not advisable.

§ 140. Classifications

Any classifications of the stock should be very clearly set out in the charter. These classifications are varied and numerous. The most usual is that of common and preferred stock. This preferred stock may be divided into different classes as to precedence in dividends, or as to amount of dividend, or as to participation in assets, or as to redemption features, or as to participation in dividends beyond preferred dividends, or as to voting or other powers.

The common stock is sometimes classified in regard to voting powers, each portion or class having the right to elect a certain number of directors, or at times one portion of the common stock may be given the sole right to vote upon certain kinds of questions or under certain contingencies.

Such charter classifications are not allowable in all of the states, but the same result may be attained in many cases by suitable by-law enactments unanimously adopted at the first meeting of stockholders. As stated by Judge Folger in Kent v. Quicksilver Mining Co., 78 N. Y., 159, 178 (1879):

"We know nothing in the constitution or the law that inhibits a corporation from beginning its corporate action by classifying the shares in its capital stock, with peculiar privileges to one share over another, and thus offering its stock to the public for subscriptions, thereto."[1] (See §§ 65, 166.)

§ 141. Common Stock

Usually the charter provisions affecting common stock are few and simple. For example, if a corporation is to be capitalized at $100,000, with shares of the par value of $100, without preferred stock or classifications of the common stock, the charter would merely state that the capital stock is to be $100,000, divided into 1,000 shares of the par value of $100 each. Nothing more would be necessary. The fact that it was all common stock, that this was unclassified, and that there was no preferred stock or restrictions of any kind on the common stock, would be understood without specific statement.

If there are to be any classifications of the common stock or any restrictions upon it in any way, these must be stated in the charter specifically and in detail. The mere fact that common stock is usually unrestricted renders it the more necessary to be clear and explicit if restrictions are to be created.

[1] Burke v. Gas and El. Co., 123 Pac. (Kans.) 857 (1912); Page v. Whittenton Mfg Co., 97 N. E. (Mass.) 1006 (1912).

§ 142. Preferred Stock

Preferred stock, by its mere existence, indicates the fact that it has features not possessed by other stock of the corporation, but the differences and preferences which distinguish it should be stated as clearly as possible in the creating clause, and so concisely, if it may be done, that the entire clause may be printed on the face of the preferred stock certificates.

It should be borne in mind that unless otherwise provided by the charter, preferred stock has all the rights of common stock in addition to its preference; that is, it would vote, participate in any dividends in excess of its preferential dividend, participate in any distribution of assets on the dissolution of the corporation, and generally be on exactly the same plane as common stock except as to the indicated preference in dividends. If any of these rights are to be denied it, such denial must be clearly expressed. If it is to have any rights other than its preference dividends, these rights must also be clearly indicated. Nothing should be left to implication, or be taken for granted. (See Chapter IX, "Preferred Stock.")

CHAPTER XX

LOCATION AND DURATION OF CORPORATIONS

§ 143. Domestic and Foreign Corporations

In its own state—the state in which it is incorporated—a corporation is a "domestic corporation." Elsewhere it is designated a "foreign corporation." In its own state it usually enjoys rights and privileges not accorded a foreign corporation; hence, unless there is some strong reason to the contrary, it should always be incorporated in the state in which the larger part of its business is to be done.

§ 144. Selection of State

The usual inducements for foreign incorporation are the smaller fees and taxes of the selected state. (See Chapter VI, "Cost of Incorporation.")

Unless there is a material difference in favor of foreign incorporation, it should be avoided. Corporations organized outside the state are always liable to adverse discrimination, and in many states are at a positive disadvantage in event of litigation. (See Chapter V, "Where to Incorporate.")

§ 145. Principal Office

Usually the location of the office in which the corporation is to have its headquarters must be designated in the charter application. In New Jersey and most of the other states, this principal office must be located definitely. In New York, the borough and county in which the principal office may be found must be given, but neither then nor later is any more definite address required. This renders it impossible to secure the

local address of a corporation from its charter—a seemingly serious omission. The weight of authority is that the location of the principal place of business stated in the charter is conclusive for the purposes of taxation,[1] jurisdiction of federal courts,[2] and other purposes.[3]

It is a general principle of law that stockholders' meetings must be held within the state of incorporation, and the principal office in that state is usually designated by the by-laws as the place where such meetings are to be held. One or two states, by statute provision, permit stockholders' meetings to be held outside the state, but the practice though convenient in some cases is, generally speaking, objectionable.

In the absence of any statutory provision on the subject, it is generally held that directors may hold meetings and transact business outside the state of incorporation.[4] In New York a contrary ruling was made, but it is now provided by statute that if meetings of the board of directors of a corporation organized under the Business Corporation Law are to be held only within the state, the certificate of incorporation or by-laws must so provide.[5] Of course, if prohibited by statute, meetings of the board of directors cannot be held outside the state, and action taken at such meetings will be void.[6]

Permission for directors' meetings outside the state is given by the statutes of several of the states besides New York, and, used under proper regulations as to place and notice, such meetings are at times of much advantage. When directors are especially authorized to meet outside of the state there is, of course, no question as to the legality of their actions at such meetings.[7]

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[1] Union Steamboat Co. v. City of Buffalo, 82 N. Y. 351 (1880); Loyd's Executorial Trustees v. City of Lynchburg, 113 Va. 627 (1912).

[2] Lemon v. Imperial Window Glass Co., 199 Fed. 927 (1912).

[3] *In re* Federal Contracting Co. 212 Fed. 688 (1914).

[4] 2 Machen on Corp., § 1462 and cases cited; Handley v. Stutz, 139 U. S. 417 (1891); Boatmen's Bank v. Gillespie, 209 Mo. 217, 256 (1908).

[5] N. Y. Bus. Corp. Law, § 2.

[6] Hilles v. Parrish, 14 N. J. Eq. 380 (1862); Place v. People, 192 Ill. 160 (1901).

[7] Saltmarsh v. Spaulding, 147 Mass. 224 (1888); Ormsby v. Copper Co., 56 N. Y. 623 (1874).

Meetings of both stockholders and directors are usually held in the principal office in the state of incorporation. To allow meetings of either stockholders or directors to be called elsewhere, unless in places formally designated by the by-laws or agreed to by all parties in interest, gives opportunity for grave abuses. The by-laws should designate the principal office and, unless there is good reason for doing otherwise, prescribe that all corporate meetings be held therein.

The principal office in the state of incorporation is usually designated by the statutes as the place where legal process may be served on the corporation.

§ 146. Duration

In some states corporate existence is limited to a fixed period, as twenty or fifty years. In most of the states, however, the duration of a corporation may be made nominally perpetual. This unrestricted duration is advantageous and is in line with the greater liberality manifested towards corporations in later years. No serious objection can be urged against it, the reincorporations necessary in the short period states are avoided, and the general stability of the corporation is improved.

Where corporate existence is limited by statute, the extreme statutory period is usually selected with the expectation of a reincorporation at its ends. At times, limited periods are preferred for the corporate existence in order definitely to limit the period of the association undertaking. In such case, at the end of the selected term the corporation expires by limitation, its assets are distributed, and the corporate venture is terminated. Usually such distribution is made under some prearranged plan in order to avoid the losses and injury to good-will of a forced liquidation.

CHAPTER XXI

THE BOARD OF DIRECTORS

§ 147. Qualifications

At common law it was not required that directors should be stockholders. In most states of the Union this has been modified by statute provisions requiring that directors hold one or more shares of stock. Such provisions do not apply, unless expressly so stated, to directors named in or appointed by the charter. In New York the statute requiring directors to be stockholders may be waived by proper charter or by-law provision, and persons not stockholders may then be selected as directors of the corporation.

In general it is very advisable that directors should be stockholders of the corporation in which they act, and the liberality of the laws in permitting persons who are not stockholders, or who hold but one or two shares, to act as directors, is not in the best interests of stockholders. Occasionally the privilege may be advantageous, but as a general rule the management of a business enterprise cannot safely be placed in the hands of those having no material interest in its success, and the incorporation of an enterprise does not exempt it from this rule.

In most states, the statutes require that one or more of the directors be residents of the state of incorporation. In such cases, where the parties really interested reside in other states than the one selected for incorporation, resident directors must be secured. In some states, as New Jersey, Maine, and South Dakota, this has led to the organization of concerns whose sole business is supplying of resident directors

and the representation of outside corporations organized within the state. At times this has the very unexpected result of giving some dummy director the deciding vote as between two equally divided factions of the board. A recent statute in New York makes the added requirement that at least one of the directors shall be a citizen of the United States.

Unless debarred by some statutory prohibition, anyone capable of acting as an agent of a corporation may act as a director. A trustee, or an executor of an estate consisting in part of stock, would be eligible as a director. Under the modern statutes removing their disabilities, married women may act as directors. Unless expressly prohibited by statute, aliens may act as directors.

§ 148. Number

Some limitation upon the number of directors is usually imposed by the statutes. The exact number within these limits is, in most states, fixed by the charter. In practically all the states a minimum number of directors is fixed by the statutes, though in many no maximum number is prescribed.

In general the membership of the board should be fixed at the lowest number that will permit due representation of the various interests involved and provide for the proper transaction of business. In small or close corporations it is usual to select the minimum number of directors permitted by the statutes. In the larger corporations more directors are usually necessary in order that all the interested parties may be represented, or in order that all the parties really concerned in the management of the corporation may participate in the deliberations and actions of the board. Frequently the board is increased far beyond the needs of management in order to secure names that will attract investors and add to the financial stability of the corporation or benefit it in other ways.

If the number of directors is made too large it is difficult

to secure a quorum, meetings are apt to become infrequent and perfunctory, the members of the board do not keep in touch with its business, and some further device must be resorted to for the real conduct of the business. Under such circumstances the management is sometimes left in an irregular way to the officers and a few actively interested directors; usually, however, the difficulty is met by the appointment of an executive committee, to which is sometimes added a finance committee and upon occasion other special committees. These committees then exercise the powers of management that usually pertain to the board. (See § 152; also Chapter XXIX, "Standing Committees.")

For the business operations of an ordinary corporation a board of five or seven members actually in control—three or four, respectively, forming a quorum—is far better than a larger board in nominal control but with special committees doing the real work.

§ 149. Authority

The stockholders are the owners of the corporate property, but the direct, active, and immediate control rests with the board of directors. The authority of the board exists under the common law, extends to all subjects connected with the management of the corporate affairs, and, unless in some way restricted, is practically supreme. Its actions in the conduct of the corporate business cannot be questioned or interfered with by the stockholders unless in case of gross mismanagement or actual fraud.

"The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither encumber nor transfer that property, nor authorize others to do so. The corporation—the artificial being created—holds the property, and alone can mortgage or transfer it, and the corporation acts only through its officers,

subject to the conditions prescribed by law."[1] As far as the corporate management is concerned, the stockholder's position is but little more than that of an interested spectator.[2]

If such unrestrained power in the hands of the board is considered undesirable, it may usually be restricted by charter provision or by-law regulations. In a few states certain restrictions—and in some cases extensions—of the power of directors are found in the statutes.

Where special charter provisions are permissible, any desired restrictions upon the power of the board should be incorporated in the charter. If this is not possible they may usually be embodied in the by-laws, where they are equally effective but lack stability, as by-laws are easily changed.

By either of these methods the power of the board to incur obligations may be limited; their power to sell the assets of the corporation may be restricted; it may be required that two-thirds or other proportion of the entire number must concur in all expenditures above a certain amount; the payment of excessive salaries may be prohibited; expenditures within a certain period may be limited; and many other restrictions, depending upon the particular conditions, may be imposed. (See §§ 108, 159, 225.)

§ 150. Power to Pass By-Laws

The board of directors have no power to pass by-laws, or to amend existing by-laws, unless expressly authorized thereto by the statute law of the state, the charter of the corporation, or its by-laws. Where special provisions cannot be included in the charter, the only method of giving the directors power to amend the by-laws is by express by-law provision. The stockholders may legally delegate their power in this manner.

[1] Justice Field in Humphreys v. McKissock, 140 U. S. 304, 312 (1890).

[2] 2 Cook on Corp., §§ 709, 712; 3 Clark & Marshall on Corp., § 691a; Sellers v. Greer, 172 Ill. 549 (1898); Ellerman v. Ry. Co., 49 N. J. Eq. 217 (1891); Humphreys v. McKissock, 140 U. S. 304 (1890); Denver Engineering Works v. Elkins, 179 Fed. 922 (1909).

It may be advisable that the board shall have power to pass additional by-laws to meet new situations and emergencies as they arise, and, where this is so, the desired power may be given them by an authorization to supplement the by-laws adopted by the stockholders. This is as far as is prudent. To place unrestricted power to make and amend the by-laws in the hands of the board would seem a dangerous and unnecessary removal of one of the most important safeguards of the corporate form.

In the smaller corporations where a stockholders' meeting may be readily called in case of an emergency, there would seem to be no real object or advantage in giving the board any power whatsoever over the by-laws. In the larger corporations that power should only be granted with caution as one that is of but occasional utility, and that may be used to the disadvantage of the general corporate interests. (See § 170.)

§ 151. Classification

The classification of directors in such manner that but a portion of the board is elected at any one annual meeting, is at times a convenient and advantageous arrangement. Its object is to prevent the sudden alterations of membership and policy which are always possible where the entire board is elected at one time, and also to render the selection of desirable members more probable by lessening the number to be elected at any particular time.

It is to be noted that the classification of directors is but seldom necessary where cumulative voting prevails, as the sudden change of the entire board that might otherwise result from a passing of the control of the stock of a corporation is then hardly possible. In the smaller corporations classification of directors is but rarely desirable and is not often found.

The most common classification of directors is the division

of the board into three classes equal in number, each class holding for three years, and one class being elected each year. Under this plan three years are required for a complete change of the personnel of the board.

Classification of directors is attainable in almost every state. Where permissible, such classification should be provided for in the charter. Where special provisions are not allowed in the charter, it may usually be secured by by-law provision. Unless actually prohibited by the statutes or precluded by implication, such classification may be secured by either charter or by-law provision.

It is unusual to provide for more than three classes of directors, and such classified board should preferably consist of some number that will permit three equal divisions, as three, nine, or fifteen. The classes might be made unequal, that is, if the board consisted of eleven members, three might be elected one year, four the next year, and four the third. Such arrangement is, however, not common.

Upon the organization of a corporation with a classified board the whole number of directors are usually elected at once, the term or class of each director being decided by some agreed method. For instance, in a board of nine members, divided into three equal classes, the three directors receiving the highest number of votes might constitute the longest term class, the three receiving the next highest number of votes the class for the intermediate term, and so on. (See § 196.)

It is to be noted that the stability of management sought by classification of directors may be secured—and at times even more efficiently and conveniently—by the creation of a voting trust. (See Chapter LII, "Voting Trusts.")

§ 152. Standing Committees

The board of directors is the managing body of a corporation and supposed to be in direct charge of its affairs. When

the board is of moderate size this direct supervision is usually exercised, but when the directors are numerous it is not always practicable, and standing committees are then usually employed. (See Chapter XXIX, "Standing Committees.")

These committees are appointed or elected in such manner as may be prescribed by charter or by-laws, must be composed of members of the board of directors, and, subject to the provisions by which they are created and empowered, usually exercise all the powers of the board in their respective fields.

Any necessary number of these committees may be appointed, but they are usually limited to two—the executive committee and the finance committee—the first-named committee exercising its powers over the general affairs of the corporation, while the powers of the last-named committee are usually confined to matters relating to finance.

CHAPTER XXII

SPECIAL PROVISIONS

§ 153. General

The first general laws relating to incorporations were harsh. Only one purpose was allowed, the privileges granted were few, and all corporations were to be organized and operated on exactly the same lines. Only one mold was provided, and, if this did not happen to fit the needs of any particular corporation, relief could be had only by recourse to a special charter or enabling act.

These narrow and unnecessary limitations were slowly and grudgingly relaxed, but no marked advance was made until New Jersey recognized the necessity of greater freedom and flexibility, and also perceived the very material advantages that might accrue to the state itself from more liberal corporate legislation. Her legislators then proceeded to remodel the bare laws existing at that time, so as to allow a plurality of purpose, all proper special powers, and a freedom and convenience not theretofore enjoyed by corporations formed under general laws. To this politic concession to the reasonable business demands of the times is principally due the repute—and resulting revenue—which New Jersey enjoyed and still enjoys as a state for incorporation.

The greater scope and freedom of action of New Jersey corporations under the new law was mainly due to its express recognition of special charter provisions. The right to include such provisions in the charter is conferred by the following clause from the statute:

"The certificate of incorporation may also contain any provision which the incorporators may choose to insert, for

the regulation of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors and the stockholders, or any class or classes of stockholders; provided such provision be not inconsistent with this act."[1]

This enables the incorporators to secure through charters granted under the general laws, powers, privileges, and regulations formerly possible only under special charters. This statute has been followed in Delaware, to a certain extent in New York, and, with more or less variation, in a number of other states.

In those states in which special charter provisions are not allowed, many of the desired powers, restrictions, or regulations may be obtained through by-law provisions. In some matters and under some circumstances this may be done effectively, but usually the by-laws may be amended or repealed with comparative ease, and their provisions do not always have the necessary permanence.

Where the statutes do not permit special charter provisions, and desired provisions cannot be properly or permanently included in the by-laws, the only recourse is to incorporate in some more liberal state where such provisions are permitted. The corporation would thereafter operate in its own state as a foreign corporation. Outside incorporation for such a purpose would be justified only where the special provisions obtained were of considerable importance.

§ 154. Usual Objects of Special Provisions

Many of the corporate features already discussed, such as cumulative voting, classification of directors, and limitations of the directors' power of incurring obligations, are fre-

[1] Laws of 1896 (N. J.), Ch. 185, § 8, p. 280, as amended by Laws of 1898, Ch. 172, p. 408.

quently best secured by, and are common as, special charter provisions. In addition to these are many other provisions designed to meet the varying requirements of particular incorporations, such as limitations on the voting power, limitations on salaries, and provisions authorizing a reserve fund or the accumulation of operating capital, etc.

In the different states the variation of the statute laws as to special charter provisions is wide. Thus in some states such provisions are not provided for and are therefore not permissible at all; while in other states almost any desired provision is permitted in the charter. In New Jersey by charter provision the directors may be empowered to alter, amend, or repeal by-laws, while in New York the exact power of the board as to by-laws is laid down in the statute law, and cannot be denied or modified in any way by charter provisions. Again in New Jersey the directors may be empowered by the charter to mortgage any or all of the corporate property without consulting the stockholders; but in New York the corporate property may be mortgaged only with the consent of two-thirds of the stockholders of the corporation, and any charter provision to the contrary would be absolutely non-effective. The New Jersey courts have held that a provision in the charter of a corporation that any resolution in writing signed by all of the members of the board of directors should have the same effect as if passed at a duly called meeting, is void, because inconsistent with the provisions of the General Corporation Law.[2] On account of this wide difference it is necessary to consult the statutes when any special provisions are under consideration.

§ 155. Cumulative Voting

Cumulative voting is one of the most common and one of the most important of special charter provisions. Its

[2] Audenried v. East Coast Milling Co., 68 N. J. Eq. 450 (1904).

usual purpose is the protection of minority interests by securing to these interests representation on the board of directors.

As its name indicates, cumulative voting is a system or method of cumulating or concentrating votes. Under it the owner of stock is, for each share of stock he owns, entitled to as many votes for directors as there are directors to be elected, and at any election of directors may cast these votes pro rata among all the directors to be elected, or all for one director, or may distribute them among two or more as he sees fit. That is, if the total number of directors to be elected is seven, the owner of one share of stock might cast one vote for each of the seven directors, or might cast seven votes for one director, or cast four votes for one director and three for another, or apportion his seven votes in any other way he chose among the candidates.

Under this arrangement it is obvious that even a small minority, by combining on one candidate, may secure representation on the board. At times this representation becomes of much importance. If the minority are not represented, they are debarred from information of what the majority propose to do. Under such conditions action may be taken which cannot be undone, but which the minority might have prevented by injunction or other means had they been informed in time. Also the mere presence of a capable minority representative on the board prevents many abuses of power that might otherwise occur. For this and other reasons, cumulative voting is, from the minority standpoint, always a wise provision and occasionally becomes a matter of the most vital importance.

Cumulative voting may, in many states, be secured by proper provision in the charter and in Colorado the charter must provide whether or not cumulative voting shall be allowed. In Pennsylvania, South Dakota, West Virginia, and a number of other states it is mandatory without refer-

ence to any charter provisions. In Nevada it is mandatory unless the charter provides otherwise. In a few states it is doubtful whether the provision would be allowed in the charter or would be effective if included. (See § 424.)

§ 156. Classification of Stock

Where special charter provisions are allowed, classification of stock is common. Stock may be classified in many ways. The most usual of these are the division of the capitalization into common and preferred stock; division of the preferred stock into classes, as first, second, etc.; and division of the common stock into classes, each class electing a due proportion of the directors, etc. (See Chapter VIII, "Stock.")

The division into common and preferred stock and the indicated division of preferred stock may be secured by charter provision in nearly every state in the Union, together with such other proper classifications of the preferred stock as may be desired.

The division of the common stock into voting classes, and the many other classifications occasionally employed, may usually be secured by special charter provision where such provisions are allowed. (See § 140.)

Where permitted by the statutes, the classification of stock may be, and occasionally is, carried into wide variations. Sometimes a portion of the stock will be denied the voting right entirely, or will be prohibited from voting on particular questions. Certain stock may be debarred from participation in dividends for a stated period. In New York a peculiar partly paid stock may constitute a part of the issue, drawing dividends only upon the amount actually paid in upon it.

These unusual arrangements are desirable only under exceptional circumstances. Generally they are to be avoided as

being complicated, unnecessary, and at times of uncertain result.

§ 157. Corporate Stockholding

At common law a corporation cannot hold stock in another corporation. Though the law was not formulated with any such intent, its practical effect was to render the formation of trusts and combinations extremely difficult, and in many cases impossible.

New Jersey was the first state to modify the law in this direction and to grant to corporations unlimited power to hold and vote stock in other corporations, but in 1913, in an attempt to check monopoly and to do away with holding companies, the New Jersey legislature passed a drastic act taking away this power.[3] In 1915, however, an act was passed which restored the power so far as to allow a corporation to purchase stocks and bonds of other corporations for investment, but not to use the same in voting or otherwise to restrain trade or to bring about any lessening of competition.[4] Delaware and other states followed the earlier statutes of New Jersey, and in a number of these states, under existing statutes, corporations have the unlimited power first granted in New Jersey. Other states have granted the power within certain limits. New York has followed New Jersey to the extent of allowing this right where provision is made therefor in the charter, or where the corporation whose stock is purchased is of a similar nature, and one with which the purchasing corporation would be authorized to consolidate.

The right is, at times, a very valuable one and, in those states where allowed, a provision authorizing the holding of corporate securities by the corporation is usually included in the charter. (See Chapter LIII, "Holding Corporations.")

[3] N. J. Laws of 1913, Ch. 18, p. 32.
[4] N. J. Laws of 1915, Ch. 114, p. 180.

§ 158. Limitations on Indebtedness

In a large proportion of the cases where corporations are wrecked, the result is brought about by the directors' abuse of the power to incur debt. In those states where the power of the directors in this respect may be limited by charter provision, such restriction is, on occasion, very desirable. Limitations on indebtedness vary with the conditions. Under some circumstances it may be desirable to fix an absolute limit beyond which the directors have no power to obligate the corporation. Or it may be provided that if the directors exceed a certain sum, they shall be held personally liable for such excess; or that they shall not enter into any single contract involving obligations over a certain amount; or that obligations beyond a certain amount shall be incurred only with the affirmative vote of two thirds or other proportion of the whole board, or shall be undertaken only after authorization thereto by due resolution of the stockholders.

Whatever the plan adopted it should be carefully considered and adapted to the special situation, and the limitations should not be so low as to amount, nor so narrow in application, as to interfere with the ordinary operations of the business. The abuse, not the use, of the debt-incurring power is to be prevented. (See §§ 149, 225.)

It is also to be noted that conditions may arise under which the directors are powerless to prevent corporate indebtedness in excess of charter or by-law limitations. Thus, the corporate revenues may be unexpectedly curtailed but nevertheless, with a fine disregard of prohibitory provisions, taxes, rents, official salaries, and other contract obligations continue to roll up a constantly increasing load of corporate debt. In such cases the directors cannot be held accountable, though the limitation has been exceeded.[5]

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[5] *In re* Putnam, 193 Fed. 464 (1911).

§ 159. Limitations on Salaries

The diversion of profits by excessive salaries is a not uncommon method of draining a corporate treasury and thereby preventing the payment of proper dividends. If not properly guarded against at the time of the organization of the corporation, such practice may be extremely difficult to correct or prevent later.[6]

Charter provisions imposing limitations on salaries should not be made too narrow or too inflexible. Good management is an absolutely indispensable element of success, and fair salaries, with even more liberal compensation when demanded by the welfare of the company or justified by the excellence of the management, should not be rendered impossible by too narrow restrictions.

Flexibility of restriction in the matter of salaries may be provided for in various ways. The charter provision may merely require that salaries be fixed, and varied thereafter if need be, by a two-thirds vote of the entire board. Occasionally the concurrence of the entire board may be required. Or the salaries of officers may be determined each year at the stockholders' annual meeting by a stated majority of the entire outstanding stock. In such case the required majority may be fixed so high as to require the concurrence of any desired part of the minority interests. Or it may be provided that no official salary shall be increased over a stated figure, until a dividend of, say, 6 per cent has been paid upon the outstanding stock for two or more years. Or any salary payments over a certain minimum might be made absolutely dependent each year upon the payment of a certain dividend for the previous year.

It is to be noted that where the ease of alteration is not objectionable, provisions limiting indebtedness and salaries are

[6] Raynolds v. Diamond Mills Paper Co., 69 N. J. Eq. 299 (1905); Jacobson v. Brooklyn Lumber Co., 184 N. Y. 152 (1906); Davids v. Davids, 135 A. D. (N. Y.) 206 (1909); Carr v. Kimball, 153 App. Div. (N. Y.) 825 (1912).

usually included in the by-laws instead of the charter. Here they may be modified as the circumstances demand, whereas in the charter they may be altered only by formal amendment of that instrument. But to protect the minority effectually, such limitations must under ordinary circumstances be inserted in the charter. (See §§ 149, 225.)

§ 160. Sundry Provisions

Many other provisions will on occasion be incorporated in the charter. This is especially so in the incorporation of a partnership or the reorganization or consolidation of corporations, when special provisions are often necessary to insure the varying interests, or to carry out agreements entered into as a prerequisite to the proposed arrangement.

It is essential that such provisions shall not go counter to any law regulating corporations, and important that they be not such as to involve the corporation in any subsequent deadlock or entanglement. The death of parties, sale of stock to strangers, change of industrial conditions and other mutations may make apparently desirable arrangements exactly the reverse. It is not always possible to amend a charter, and, if there is any doubt as to the expediency or effect of any particular provision, it should be brought into the by-laws rather than the charter. Then if found undesirable, it may usually be amended or altered by a mere majority vote of the stockholders.

CHAPTER XXIII

EXECUTION AND FILING OF CHARTER

§ 161. General

In each state the essential features of the charter are prescribed by its corporation laws. In many states a form of charter application is prepared by the state authorities and will be furnished by them on application. Where this is not done the forms are usually prepared by law stationers and kept on sale. Care should be exercised in the use of these prepared forms, as they sometimes contain undesirable features which must be eliminated before the form is used. In some states most of the published forms—and notably those for New Jersey and Delaware—include the objectionable provisions of the trust charters whereby the minimum of power is left with the stockholders and the rights of the minority are reduced to their lowest terms. Such features, while possibly adapted to trust management, are not usually desirable for an ordinary corporation.

If any of these prepared forms have received the sanction or approval of the state authorities, such forms should either be used or be closely followed. To depart materially therefrom is to invite objection, which may at times be captious and in any case will cause delay and trouble. The authorities cannot be deemed unreasonable in their preference for forms which have been passed upon, with which they are familiar, and which, when used, enable them the more readily to determine the legality and correctness of an application.

In addition to the usual provisions of the charter, any special provisions desirable for the particular corporation and

permissible under the laws of its state will be included and the charter application is then ready for the final formalities. These consist of its signing, acknowledgment, and filing.

These final formalities are in a general way similar in almost all the states, but, as the matter is one of statutory regulation, the laws of the particular state must be consulted for the details of procedure.

§ 162. Signing and Acknowledgment

Each of the incorporators must sign and acknowledge the charter application. If there are but three incorporators and they come together for the signing and acknowledgment of the instrument, the formality is a simple one. The three acknowledgments are taken at the one time and one notarial certificate serves for all. If the notarial officer who acts in the matter calls on the incorporators at their offices or residences and takes their several acknowledgments, the one notarial certificate will still serve. If, however, the incorporators are numerous, live in other states, or for any other reason cannot be easily reached or assembled, separate notarial certificates may be necessary for each acknowledgment. A party to the charter cannot act as notary therein.[1]

These acknowledgments may usually be taken by a notary public, commissioner of deeds, justice of the peace, or other officer authorized to take acknowledgments to deeds. If taken in another state, a certificate may be necessary as to the due appointment and authority of the officer by whom the acknowledgment is taken. The statutes are in most cases explicit as to the details of acknowledgment, and, as the whole matter is one of statutory regulation, these must be closely followed.

In some states, in addition to the usual execution by the incorporators it is necessary to secure the approval of the pro-

[1] People, etc. v. Commissioners, 105 App. Div. (N. Y.) 273 (1905).

posed incorporation by some designated court, or by a judge of such court, as one of the preliminaries to filing.

§ 163. Filing

The technical details of filing the charter application vary to some extent in the different states. In some the application is sent directly to the Secretary of State, accompanied by the prescribed fees. In others, the application must be sent direct to the Secretary of State but the filing fees are paid the State Treasurer, who before the charter will be filed must certify to the Secretary that this has been done. Again in some states the charter must be filed with the clerk of the county court in the home county of the corporation, before filing with the Secretary of State; elsewhere the charter must be filed with the clerk of the county court after its filing with the State Secretary.

The treatment accorded the charter applications by the filing officials also varies in the different states. In some, these officials consider that the insertion of unauthorized or improper powers gives no legal authority, and that they are not called upon to decide the legal effect of the verbiage employed, and, in accordance with these views, accept any powers or purposes not openly in conflict, or glaringly outside the intent of the law. In other states, on the contrary, the authorities scrutinize the application in detail, and, if its purposes and powers seem to exceed the statutory limits, decline to file the application. In such case the application is returned with an explanation or statement of the reasons for its refusal.

At times the state authorities clearly exceed their authority in passing upon the legality of the indicated powers of a charter application. In such case if the matter were of sufficient importance and the delay not too serious, the courts might be invoked and the points in question be decided by competent authority. Generally, however, the importance of the

matter will not justify such proceedings, and, if the official ruling cannot be changed, the purposes or other matters in question must be either omitted or so changed as to meet the views of the authorities.

If any required alteration in an executed charter is on some non-essential point, and all the incorporators agree thereto, it is not usually necessary to redraft and re-execute the entire instrument. The change may be made in the original instrument either as an interpolation or as a correction, and the document be then returned for acceptance in its amended form.

When a required alteration is material, the better practice is to have the instrument redrawn and executed afresh by the incorporators. If, however, a material alteration were made in the instrument without any re-execution, but with the consent or subsequent acceptance of the incorporators, and the charter so altered were duly allowed and filed by the state officials, it is not probable that it could later be successfully attacked.

In some states, when an application is approved, a charter pro forma is issued under the Seal of State granting to the corporation the desired rights, powers, and privileges. In other states the charter application itself changes its nature, and as soon as filed becomes the charter of the then authorized corporation. Its form is not changed, but its force is and it is then an authorization from the state for the organization of the corporation with all the powers, privileges, and characteristic features detailed in the one-time application.

§ 164. Certified Copies

In some states, as already said, when a charter application is approved, the Secretary of State issues a duly certified charter under the Great Seal of State as part of the regular routine. In others, the Secretary merely notifies the party

filing the application that it has been accepted and filed, this accepted application then becoming the charter of the corporation. In this latter case the Secretary will at any time upon payment of the legal fees furnish certified copies of the accepted application—now the charter—which is always due legal evidence of incorporation.

Where certified copies of the charter are to be recorded with the local authorities, they must, of course, be secured from the state authorities as part of the organization routine. Beyond this, the possession of a certified copy of the charter is of no importance, save very rarely in cases of litigation, and, on occasion, for its effect on interested parties—or parties to be interested. It is usual, however, to secure and preserve a certified copy among the archives of the corporation.

CHAPTER XXIV

AMENDMENT OF CHARTER

§ 165. General

The connection between corporate organization and charter amendments is not at first sight obvious. Charter amendments are, however, too often the result of hasty or careless preparation of the original instrument. Also changed or unforeseen conditions not infrequently render charter amendments desirable before the corporate organization has been completed. A brief consideration of the subject is therefore in place.

New Jersey, with its usual accommodating recognition of possible corporate needs, permits the amendment of a charter by a very simple process at any time before the corporate organization is completed. In this way new conditions may be provided for and the cruder defects of a hastily prepared charter may be easily remedied. Thereafter, as in other states, the charter may be amended only by the regular procedure provided for such cases. Delaware has a like provision.

In New York if there are informalities in the original charter, or defects in its proof or acknowledgment, or if the charter contains any matter not authorized by law, the statute provides a simple method of correcting these defects by permitting the incorporators or directors to file an amended charter.[1]

§ 166. Subject Matter

Any provisions may be brought into a charter amendment that might have been brought into the original charter. As

[1] Gen. Corp. Law, § 7.

soon as allowed, the provisions of such amendment become to all legal intents part of the original charter and as permanently binding on the corporation.

When an amendment has been made, such amendment and the original charter taken together constitute the working charter of the corporation; the amendment, however, taking precedence over and modifying the original charter in all points of difference.

§ 167. Procedure

The procedure for the amendment of a charter is, in each state, prescribed by law. There is but little uniformity in the different states, though in all the procedure is troublesome and at times expensive. In many states the statutory procedure varies with the nature of the amendment. Thus in New York, to change the name of a corporation application must be made to designated courts, while to change the number of directors application must be made to the state officials.

Generally, an amendment of the charter requires a duly called meeting of the stockholders, at which a two-thirds majority of the stock interests outstanding must vote in favor of the proposed changes. The amendment, duly acknowledged as evidence of the stockholders' authorization, must usually be filed in the same offices and with the same formalities as the original charter.

In some states advertisement must be made for a prescribed time before any charter amendment goes into effect. The proportion of the stock vote required, the notices to be given, and the other formalities also vary in the different states. In Delaware a bare majority have power to amend the charter.

Part VI—The By-Laws

CHAPTER XXV

GENERAL CONSIDERATIONS

§ 168. Functions of By-Laws

A modern corporation is regulated, first, by the general laws under which it operates; second, by the provisions of its charter; and third, by its by-laws. When the incorporators meet pursuant to the authorization of their charter for organization, both the general laws and the charter exist for the guidance of the new corporation. To these must be added the by-laws to provide for such details of organization, administration, and business routine as are not prescribed by the laws nor provided for in the charter. This is the first and most important function of the by-laws.

Beyond this, any special provisions for the regulation of the corporation, its directors, officers, or membership may be incorporated in the by-laws when such provisions are not permitted in the charter or when the permanence of a charter provision is not desired.

In addition, the by-laws are also usually so drawn as to constitute a systematic statement of the more important working details of both the general law and the charter. This is not done with any idea of adding to the binding force of the requirements of these higher authorities, but merely as a restatement, the by-laws being thereby rendered a more complete code for the guidance of the corporate officials and stockholders.

This use of the by-laws is customary and of considerable importance, helping to secure the observance of those statutory and charter provisions which, if not in such accessible form, might be overlooked or forgotten.

§ 169. Subject Matter

There is usually no law, save the law of necessity, compelling a new corporation to adopt by-laws. Its operation without by-laws would, however, be practically impossible—so much so that the law confers the power to make by-laws and takes it for granted that this right will be exercised. Provisions for the regulation of the corporation are found both in the statute law and the charter, but these are for the most part general in their nature. There are none of the specific details essential for proper corporate operation.

Just what matters should be provided for in the charter and what in the by-laws is, to some extent, determined by the conditions of the particular corporation. The statutes usually prescribe certain essential matters that must appear in the charter. In addition, all such important matters, outside the ordinary routine of corporate procedure, as are intended to be permanent features of the organization should be incorporated in the charter. (See Chapter XXII, "Special Provisions.") The routine details of corporate procedure, and any special provisions which are not intended to be permanent or which are not permissible in the charter, are reserved for the by-laws. Generally speaking, nothing should be incorporated in the charter that may be as effectually provided for in the by-laws.

The by-laws, as has been stated, also usually contain many provisions of the statute law and the charter which are repeated in the proper connection in the by-laws merely that these latter may, in themselves, be a complete working code. The by-laws will, then, contain all the ordinary working details of corporate regulation and most—if not all—of the im-

portant statutory and charter provisions directly affecting the corporation, frequent reference to the charter and to the statutes being thereby rendered unnecessary.

Under the head of routine details, the by-laws should, in strict conformity with any requirements of statutes or charter, provide for the issuance and transfer of stock, the meetings of stockholders and directors, the election of directors and officers, the duties and limitations imposed upon these, the care and management of the property and finances of the corporation, and the other connected incidents of corporate procedure.

There are certain general restrictions upon the making of by-laws which the courts will enforce. By-laws must not be inconsistent with the existing laws or with the charter of the corporation;[1] they must not operate unequally upon any of the class which they are intended to govern;[2] they must not impair any vested right of any stockholder,[3] and they must not be unreasonable.[4]

§ 170. Power to Make

The power to make by-laws is one of the common-law powers enjoyed by corporations. Where the common law still prevails, the right to make by-laws resides in the stockholders duly assembled in lawful meeting. Power to make by-laws may be delegated by the stockholders to the directors, but may be resumed at any time by the stockholders, and may be exercised by the directors only under such limitations as the stockholders prescribe. This power over the by-laws is perhaps the most important right reserved to the stockholders. This is so because, as already stated, the stockholders

[1] Raub v. Gerken, 127 App. Div. (N. Y.) 42 (1908); People v. Ittner, 165 Ill. App. 360 (1911).
[2] Griffith v. Klamath Water Users' Assn., 137 Pac. (Ore.) 226 (1913); 10 Cyc. 356 and cases cited.
[3] State v. Board, etc., 164 S. W. (Tenn.) 1151 (1914); Wright v. Knights of the Maccabees, 196 N. Y. 391 (1909).
[4] State v. Mayor, etc., of Jersey City, 37 N. J. L. 348 (1875).

cannot manage the affairs of their corporation directly but only through the board of directors. This board is not amenable to either request or resolution of the stockholders and has wide latitude and great independent power in the management of the corporate affairs and property. If any restrictions are to be imposed upon the directors' powers, recourse must be had to special charter or by-law provisions. Special charter provisions are of limited application and not always available, and in most cases the wishes of the stockholders as to the management of their property and business must be expressed in the by-laws, and can be effectively expressed in no other way. For this reason anything affecting the stockholders' sole right to make, repeal, and amend these by-laws is a matter of vital importance.

In New Jersey and those other states which have modeled after her corporation laws, the charter may be so worded as to give the directors power to make and amend by-laws. This gives the directors the power to alter the regulations by which they themselves are controlled. The expediency of such an arrangement is exceedingly doubtful, even in the large industrial combinations for whose benefit it was devised. Its tendency is to put much power into the hands of the directors and of the majority stockholders by whom such directors are elected, and to diminish correspondingly the status and power of the minority stockholders.

In New York the directors are, by statute provision, given the power to adopt by-laws *not inconsistent with those passed by the stockholders.* This would seem to be quite as far as it is safe to go. It allows the directors to pass by-laws to meet an emergency, to provide for new conditions, or to supplement and make more effective the stockholders' by-laws, and they are fully within their powers so long as these by-laws do not conflict with the by-laws adopted by the stockholders. The directors cannot, however, remove any of the safeguards

thrown round the conduct of the business by the by-laws of the stockholders, nor modify the stockholders' by-laws in any material respect. They may act in harmony with what has gone before, but cannot alter or destroy. It is to be noted that such directors' by-laws, until repealed or superseded by action of the stockholders, are the by-laws of the company and of equal force with those adopted by the stockholders. If the original by-laws are adopted by the directors, these by-laws are the law of the corporation, and can be amended by the directors, subject, however, to amendment or repeal at the hands of the stockholders. (See § 150.)

In Illinois, by a rather strange perversion of the corporate theory of government the directors, by statute, have power to make by-laws and the stockholders have power neither to make nor amend the by-laws.[5]

§ 171. Arrangement

By-laws intended for a close corporation with but few stockholders and perhaps all these on the board of directors, may be simple in form and few in number. When intended for one of the great corporate combinations with plants in many different states, with thousands of stockholders scattered throughout the Union, with a large directorate, many officers, and numerous managing committees, an extensive and comprehensive set of by-laws is usually considered essential.

In either of these cases, and for the many intermediate corporations, it is of much advantage to have the by-laws classified and systematized so that the regulations governing any particular subject or matter may be readily found. In all the better prepared sets of by-laws this systematic classification is employed. In many cases, however, the by-laws are hardly more than a heterogeneous jumble of unconnected

[5] Steinweg v. Antiseptol Liquid Soap Co., 168 Ill. App. 479 (1912).

regulations, badly balanced, incomplete, difficult in operation, and because of this, the less likely to be observed.

In the present volume the related provisions of the by-laws are grouped in the order and under the headings given below. This arrangement is used by a number of the best organized corporations of the country and has proved very satisfactory in practice. By-laws from the simplest to the most comprehensive sets may be readily classified on these lines:

1. Stock
2. Stockholders
3. Directors
4. Standing Committees
5. Officers
6. Dividends and Finance
7. Sundry Provisions
8. Amendments

§ 172. Preparation

The by-laws usually prescribe the general organization of the corporation, and the adoption of by-laws is therefore the first important step in organizing a corporation. As the by-laws are needed so early in the corporate existence, they are customarily prepared in advance of the first meeting, this duty usually and properly falling upon the counsel conducting the organization of the corporation.

The preparation of a set of by-laws for the usual small corporation is a comparatively simple matter. For the larger corporations, with their more complex and extended organizations, the undertaking is much more difficult. Such by-laws should be prepared with nice adaptation to the needs of the particular corporation. The use of an existing set of by-laws as a basis for this work is entirely proper and good practice, but such selected set should be carefully studied and properly adapted to the wants of the new corporation. All unnecessary

matter should be dropped, the matter that is retained be made to fit the case in hand, and such new matter added as may be necessary to cover the requirements of the particular corporation.

Too often the preparation of the by-laws of a new corporation is merely a wholesale seizure of some existing set with hastily improvised interpolations to meet the most obvious individual needs of the new organization. These by-laws may have been a very admirable code of procedure for the original corporation, but so diverted they can hardly fail to be a wretched misfit and prove a fruitful source of trouble. By-laws so ill-prepared give seeming grounds for the demand that the directors be given the power to amend by-laws as the only means of avoiding serious hindrance and injury to the business.

§ 173. Adoption of First By-Laws

The preparation of by-laws requires careful consideration, and it is usually impossible to take sufficient time at the first meeting to prepare by-laws or even properly to discuss and amend a previously prepared set. This being so, the responsibility for the by-laws rests almost entirely with the lawyers to whom their preparation is entrusted. If the by-laws are to be adopted formally, this is accomplished by the reading of each section and its adoption by vote, followed by the adoption of the set as a whole at the completion of the sectional consideration. Usually, however, the by-laws are presented to the meeting in their entirety, and, without reading or other investigation of their details, are either adopted by formal vote or accepted by acquiescence. The legal effect of such adoption is the same as under the more formal procedure.

CHAPTER XXVI

BY-LAW PROVISIONS RELATING TO STOCK

§ 174. Preliminary

Formerly it was customary to begin the by-laws of a corporation with a section setting forth the name of the corporation and the amount of its capital stock. There is no objection to this, but, inasmuch as these fundamental corporate features appear in and are fixed by the charter, and there is no danger of their being overlooked or forgotten, nothing is gained by their repetition in the by-laws and they are now generally omitted.

Also in former days when preliminary subscriptions to the stock of a corporation were usual and in many cases payable in instalments, a by-law provision as to the payment of these instalments and the procedure in case of default was customary and of some importance. In the present day, however, the formation of a corporation with instalment subscriptions is comparatively rare, and when it does occur collection of the subscriptions is usually provided for by resolution of the directors. This avoids cumbering the by-laws with matter that is of no permanent utility.

The subject of stock which is considered first in the following comment is one of the most important matters of by-law regulation. In most of the states general requirements relating to the stock of the corporation, its certificates, its transfer and record, are matters of statutory regulation. These statutes should be summarized and classified in the by-laws and such additional special regulations brought in as will cover the entire working details of the subject. No open ques-

tion should be left to cause later differences of opinion, vexatious disputes, and perhaps more serious difficulties.

§ 175. Certificates of Stock

Every owner of stock for which the corporation has been paid in full is entitled to a certificate or certificates, showing the number of full-paid shares of stock owned by him. A subscriber, when his subscription is accepted, becomes a stockholder of the company and entitled to vote and draw dividends if any are declared, but is not entitled to a certificate of full-paid stock until he has paid the full subscription price of his stock. If he has paid in part he is entitled to a receipt evidencing such payment, and if the by-laws so provided, or if the corporation makes a practice of issuing certificates for partly paid stock with the amount of payments indorsed thereon, he has a right to demand such a certificate as soon as his first instalment is paid. In the absence of such by-law provision or of such a custom, it does not appear that a stockholder has any legal right to a stock certificate until he has paid in full for the stock represented thereby. It would be the better practice to issue no certificates of stock until the stock represented by such certificates is full-paid.

The holder of a certificate of stock has the right to assign the same to others, or to surrender it and—if for more than one share—have it split up and issued as he directs in certificates of total equivalent value. An assignee of stock has the same right, and whenever a duly assigned certificate is surrendered to the company a new certificate or certificates must be issued to the assignee in his own name if so demanded. If transfers with reissues of certificates are frequent, it may be advisable to impose a small transfer fee for the benefit of the secretary or other issuing officer. Such a fee, if reasonable in amount, will be upheld.[1]

[1] Giesen v. L. & N. Mortgage Co., 102 Fed. 584 (1900).

By-law specifications as to the signature and sealing of certificates are useful as prescribing in detail the execution of the certificate and the duties of the different officers concerned. Such by-law regulations must, as a matter of course, follow any statute provisions. In most states, the statutes provide for the signature of stock certificates by two officers of the corporation. In some states the statutes designate the president as one of these officers, leaving to the corporation the designation of the second officer; in other states the designation of both officers is left to the corporation. No matter who the signing officers may be, the sealing and actual issuing of the certificate is usually left to the secretary. (See § 60.)

§ 176. Transfers of Stock

General regulations regarding the transfer of stock as well as the times of closing the stock books, are in many states a matter of statutory provision, but may also properly appear in the by-laws with any other connected matter. The procedure for the transfer of stock should be plainly outlined in the by-laws as a guide to the officers of the corporation, and, more particularly, for the benefit of the stockholders who are thereby informed as to their exact rights in the matter. (See Chapter XXXVI, "Transfer of Stock.")

§ 177. Transfer Agent and Registrar

In the larger corporations, or in any corporation where the transfers of stock are numerous, the employment of special transfer agents and registrars is usually a considerable advantage. By this means the officers are relieved of much responsibility, and a safety and a convenience in the issuance of stock secured not usually possible under any other arrangement. For a small or close corporation where transfers are few, the employment of such agents is a needless expense.

Where transfer agents and registrars are to be employed,

the by-laws should give the power to appoint these to either the board of directors or to one of the standing committees. The by-law provision covering this matter should also require the signature of the transfer agent and of the registrar to every certificate issued. Where a trust company is to be appointed as transfer agent or registrar and the appointment is of probable permanence, such appointee is sometimes named in the same by-law provision. As this necessitates an amendment of the by-laws in case of any change, the arrangement is of doubtful expediency.

The duties of a transfer agent and of a registrar are distinct but are usually performed by one person or institution.

§ 178. Stock and Transfer Books

All requirements as to the stock and transfer books should appear in the by-laws. To this end the statute laws must be carefully consulted as to what books must be kept, where they must be kept, and what they must contain. New Jersey corporations are required to keep their stock and transfer books in the principal office of the corporation in New Jersey. If it is desirable that duplicates be kept elsewhere the by-laws might properly so provide. Every foreign corporation doing business in New York is compelled to keep a stock book in the principal office of the company in the state. Hence the by-laws of a corporation organized under the New Jersey laws and doing business in New York might very well specify in this particular the duties of the corporation in both states.

It is usual to close the transfer books a certain number of days before the annual meeting, and during this period stock cannot be transferred on the corporate records. If this closing of the transfer books has not already been provided for in the by-laws relating to the transfer of stock, it should receive attention here. It is also usual to provide for the closing of the transfer books a certain number of days before

dividends are paid, and any proviso as to this closing might be covered in connection with the closing of the transfer books for the annual meeting.

§ 179. Preferred Stock

The preferred stock of a corporation will probably have been specifically provided for in the charter. It is customary, however, to repeat such provisions in the by-laws for easy reference and for the information of the stockholders. As all the details relating to preferred stock are usually found in the charter provisions by which such stock is created, the by-law will be merely a more or less complete repetition of the charter specifications. In some few states preferred stock is authorized by the provisions of the by-laws, which in such event become of much more moment and should be drawn with the same care and regard for the necessities of the case as would any charter provision. The by-law authorizing the issue of preferred stock cannot be materially altered or amended after stock has been sold under its terms, except with the consent of the holders of the outstanding preferred stock. If it were modified without such consent, the changes would be ineffective as regards outstanding stock unless accepted by its holders. (See Chapter IX, "Preferred Stock.")

§ 180. Treasury Stock

The term "treasury stock" is used very loosely, and, without some defining provision, ambiguities are apt to arise. For this reason a provision is frequently brought into the by-laws for the purpose of defining the term and the status of treasury stock. Such a by-law is advisable if the corporation is likely to have stock of the kind.

The status of this treasury stock is, where not expressly fixed by statute, a matter of common law, but should nevertheless be clearly expressed in the by-laws as a matter of in-

formation for both officers and stockholders. (See Chapter XI, "Treasury Stock.")

§ 181. Lost Certificates

The loss of stock certificates is a matter of not uncommon occurrence, and the procedure in such cases should be clearly outlined in the by-laws. Stockholders have a right to certificates and, if their certificates are lost, to have them replaced, but the corporation on its part has the right to require any reasonable safeguards for its own protection before the reissuance of such certificates. If the statutes prescribe the procedure to be followed, the by-law provisions must correspond. It is seldom wise to reissue lost certificates on easier terms than those laid down in the by-law form given (Form 7, Article I, § 3, "Lost Certificates"). Only the absolute and final loss of a certificate, as in the case of its unquestioned destruction by fire, would justify an unprotected reissue.

§ 181a. Fractional Shares

Some few corporations issue fractional shares, though there is no legal authority for such action. It would seem undesirable on every account. Apart from the complexity of records and accounts, troublesome questions might arise as to legal rights of holders. What voting or dividend rights would a man have who owned, say, 9/17 of a share of stock. If a man sells a fractional interest or interests in a share of stock, he and the other parties would be entitled to have a certificate issued in their joint names, would own the share in common, and would have to arrange among themselves as to custody, voting, and dividends. The corporation need not concern itself with the transaction.

CHAPTER XXVII

BY-LAW PROVISIONS RELATING TO STOCKHOLDERS

§ 182. Annual Meetings

An annual meeting of stockholders at which directors for the ensuing year are elected is usually required by the statutes. Whether or not so required, such meeting should be provided for in the by-laws. It is the most important function of the stockholders, and the portion of the by-laws devoted to the stockholders is principally occupied with provisions relating to the annual meeting.

In specifying the time of the annual meeting it is advisable not to specify a fixed day of the month, as, for instance "January 26" but to fix the date in some such form as "the third Monday in January." The reason for this is that if the specified date as first given falls on a holiday or a Sunday, upon which the meeting cannot be held, various questions may arise as to the validity of the corporation's proceedings.

It is also a good precaution to name the time of the day at which the meeting is to be held, as precision in specifying the time and place may at some time be much needed in case notice of the annual meeting should be defective. If the hour of the meeting is not specified, it has been held that the by-law is not sufficient notice to the stockholders.[1]

In fixing the date of the annual meeting it is generally well to fix it shortly after the end of the fiscal year of the corporation so that the financial report to the stockholders may be comprehensive.

[1] Lowe v. Los Angeles Suburban Gas Co., 24 Cal. App. 367 (1914).

For the same reason the place should be definitely fixed, and—except where it is expressly provided by statute, as in Delaware and a few other states, that the stockholders' meetings may be held out of the state—the place designated must be in the state of incorporation.

The by-laws providing for the annual meeting, in addition to fixing the time and place, should in a general way specify the proceedings of that meeting. This specification of the business to be transacted at the annual meeting is not mandatory. Any portion of it can be waived by the meeting at will. Nor is it intended to limit the stockholders' proceedings in any way unless expressly so stated in the charter or by-laws. It is always expected that in addition to the specified procedure, any other business or matters of interest to the stockholders will be considered, and the order of business is included in the by-laws merely to prevent important action being omitted or overlooked and as a matter of convenience.

§ 183. Special Meetings

The by-laws must provide for special meetings of the stockholders, and fix the preliminary requirements for such meetings. Frequently the president is given authority to call special meetings at his discretion; it is always customary to provide for such meetings to be held pursuant to resolution or other specified action of the board; at times it is provided that a certain number of the directors may call special meetings by a written request or call; it is also customary and proper to allow these special meetings to be called on demand of a certain proportion in interest of the stockholders—usually one-third or a majority of the outstanding stock.

It is usual to prescribe in the by-laws that only such business as is specified in the call and notice shall be transacted at a special meeting of stockholders. This is a matter of common law, and in some states statutory law, and is included in

the by-laws merely to emphasize the fact that any business to be done at any such meeting must be previously notified to the stockholders. The call and notice, to be sufficient, must give the three essential facts—the time, place, and purpose of the meeting. If any one of these is omitted, the meeting is improperly called and its action is liable to be held illegal and may be set aside.

§ 184. Officers of Meetings

It is customary in some corporations to organize each stockholders' meeting with officers of its own choosing, who may or may not be the regular officers of the corporation. Under some conditions this plan may be a wise one, but, generally, it would seem better to provide in the by-laws that the officers of the corporation shall also be the officers of the stockholders' meetings. In such case the president, or in his absence the other officials in due order, preside, while the secretary keeps the records of the meeting. Such an arrangement saves much confusion and loss of time on occasion, and conduces to the orderly transaction and proper record of the business of the meeting.

The secretary is usually and properly omitted from the officials who may preside. The function of this officer is to record the proceedings of the meeting and it would not be advantageous to withdraw him from his proper duties to preside, even though all the other officers were absent.

§ 185. Notice of Meetings

Unless there is some material reason for not so doing, it will be found advantageous to adopt the same requirements as to time and character of notice for both regular and special meetings. When this is done the requirements as to notice may be properly included in a single by-law section. Where the notices for the two kinds of meeting differ materially, the

details for each meeting should occupy a separate sub-section under the sections providing for annual and special meetings.

The notice of regular meetings should specify the time, the place, and usually the most important objects of the meeting. Where unusual business is to be transacted, even at a regular meeting, the notice of the meeting should state that unusual business.[2]

The notice for special meetings should give the time and place of meeting and specify in detail all the business to be acted upon at that meeting.

Where a corporation has but few stockholders, the provisions as to notice of meetings will sometimes include the following provision for special meetings: "With the presence and participation, or with the consent of all the stockholders, meetings may be held at any time and place and for the transaction of any business, without notice."

Notice of meetings is best given through the regular postal channels; personal notice is allowable, but should always be served in writing. Verbal notice, while legally held sufficient, is objectionable because it is usually difficult and sometimes impossible of proof. By-laws as to notice of meetings should include all statutory requirements of publication or mailing of notices.

§ 186. Voting

The usual rule in regard to voting is that each stockholder of a corporation is entitled to one vote for each share of stock standing in his name on the books of the corporation. If there are any variations, such as cumulative voting, classified voting, or reservation of voting to one class of stock, such variation should be stated as clearly as possible. Perspicuity and precision in the by-laws relating to voting may save much

[2] 2 Cook on Corp., § 595.

trouble later. Such provisions must, as a matter of course, conform to any state statutes on the subject.

§ 187. Certified List of Stockholders

Under the laws of New Jersey and of some other states, at each regular meeting of the stockholders of a corporation a certified list of the stockholders entitled to vote thereat must be provided by the secretary. In any state the provision is a satisfactory one and may well be included in the by-laws, either as a separate section, or as a part of the by-law providing for annual meetings of the stockholders. It is to be noted that where, as is usually the case, the statutes provide that the stock books shall be the final authority as to the right of any stockholder to vote, the certified list of stockholders cannot be made a substitute for the stock book, which should be accessible in case of dispute. The certified list will, however, usually be found all sufficient, saving reference to the stock book and giving its information in much more convenient form.

§ 188. Election of Directors

As the election of directors is the most important business of the annual meeting, the by-law directions for its conduct should be very explicit. If, as is the case in certain states, the statutes require the election or appointment of inspectors—who are usually sworn to the proper discharge of their duties—the details of their appointment and duties should be fully outlined. If inspectors are not prescribed by statute and are not desired, some other method of conducting the election should be specified. It is usually advisable that it be by ballot, though this is not essential save when prescribed by statute. If by ballot, provision must be made for the appointment of tellers to collect, count, and announce the vote.

Unless included in the by-law on voting, any provisions

as to cumulative voting, or as to classification of the stock in regard to voting, should be given here. Also, if the directors are classified so that but one-third or one-fourth are elected each year, such fact should be stated under this heading.

The term for which the directors are elected should also be stated clearly. Usually this is for the ensuing year and until the election of their duly qualified successors. The directors hold until the election of their successors in any event, but the by-laws should state the fact.[3]

§ 189. Quorum

In a number of the states, the proportionate amount of the outstanding stock which must be represented at a stockholders' meeting to constitute a quorum is fixed by statute. In such case the by-laws can do nothing more than repeat the law in order that it may be remembered and observed. If the statutes do not so provide, the quorum should be distinctly prescribed by the by-laws. If not provided by either statute or by-law, the common law rule prevails, that the stockholders present, no matter how few their number, constitute a quorum.

In the absence of any statutory provisions to the contrary, the by-laws may provide that less than a majority of the outstanding stock shall constitute a quorum, but for most corporations it is not safe to depart from the usual parliamentary rule that a majority of the outstanding stock is necessary to constitute a quorum. To illustrate the necessity of a careful consultation of the statutes in this matter and in matters of corporate procedure generally, attention may be called to the fact that in New York the by-laws may prescribe the number necessary to constitute a quorum at stockholders' meetings for ordinary business, but cannot fix a quorum for the election of directors, those present at any annual meeting being a sufficient quorum for this purpose no matter how few their number or

[3] 2 Cook on Corp., § 624; 3 *Id.*, § 713.

how small a proportion of the outstanding stock they represent. This is but a special application of the general common law rule that those present at a meeting of constituent members form a quorum and may act.

It is to be noted that this common law rule applies only to the constituent membership of a body, such as the stockholders of a corporation. The directors, being a selected body, require a majority of the entire board to constitute a legal quorum.[4]

§ 190. Proxies

Proxies play such an important part in all corporate meetings that the by-law provisions relating to them should be clear and explicit. At common law the stockholder does not have the right to be represented at corporate meetings by a proxy. The right is given by statute in many states, and elsewhere proxies may be authorized by charter provision, or, in most states, by by-law enactment. Where created by statute, the by-law provision must follow the statute.

§ 191. Order of Business

The order of business is purely formal but quite essential to the proper transaction of the corporate business. It may be varied to meet the needs of any particular corporation. The order given in the by-law forms indicates the usual and logical arrangement. The formal order of business may be suspended at any meeting, in whole or in part, by a majority vote of those present, or by their mere assent.

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[4] 1 Morawetz, 2nd Ed., § 476; 2 Kent's Com., § 293; Matter of Rapid Transit Ferry, 15 App. Div. (N. Y.) 530 (1897).

CHAPTER XXVIII

BY-LAW PROVISIONS RELATING TO DIRECTORS

§ 192. General Considerations

Regulations affecting the directors and any restrictions upon their powers and action will, for the most part, appear only in the by-laws. Statutory provisions of general scope are found in practically all the states, more specific provisions appear in some states, and especially important matters are sometimes brought into the charter; but in the main the stockholders must look to the by-laws to direct and control the operations of their directors.

Much latitude is allowable in the arrangement of the by-laws affecting directors. In the larger corporation the subdivisions are frequently carried further than indicated in the present chapter; in the smaller corporations, ordinarily not so far.

Many of the details appearing in the by-laws affecting directors are matters of law, or are fixed by charter provision and are brought into the by-laws merely to save reference to the authorities from which they are taken.

§ 193. Number and Qualifications

In many states the number of directors is, within certain minimum and maximum limits, fixed by statute. In some states, as New Jersey and Massachusetts, the minimum is prescribed by statute and any number in excess of this minimum may be fixed by the by-laws. In most states the minimum number of directors allowed is three.

For a small or close corporation a limited board of directors is usually advantageous. Such a board is easily assem-

bled, is likely to keep in touch with the business, and is generally prompt in consideration and action.

In the larger corporations a more numerous directory is usual. Frequently this is necessary in order to provide representation for the different stockholding interests, as well as to have the requisite managing representatives upon the board. Though necessary, the arrangement has many disadvantages. A quorum is only secured with difficulty; the members are not close to the business and are not interested actively in its management, and lengthy explanations, much discussion, and prolonged consideration are the rule when important questions are really taken up. As a result the actual management of the business and of the corporate affairs is delegated to the standing committees, the board meeting only to listen to reports, or to act in matters of exceptional importance.

The most common qualification required of a director is the ownership of stock. This is usually regulated by statute. In some states such qualifying stock must be owned when the director is elected. In most states, if the director-elect is given or secures stock after his election, the requirements of the law are held to be satisfied. If the statutes merely state that directors must be stockholders, the ownership of one share of stock is sufficient. If the statutes are silent on the subject of stock qualifications of directors, or if they require merely that directors be stockholders, the by-laws may legally provide that such reasonable number of shares as may seem desirable shall be the qualification.

In some states it is provided that a director parting with his qualifying stock thereby *ipso facto* ceases to be a director. In order to prevent any misunderstanding on this point, the by-laws should repeat the statute provision where it exists. Elsewhere it would be prudent to state explicitly either that the parting with the qualifying stock does or does not terminate the director's tenure of office. As a general rule it would

seem advisable that directors should be stockholders of the corporation to some material extent, and that if they part with this qualifying stock they should by such disposal sever their official connection with the board. (See §§ 147, 148.)

If there is any statutory requirement as to citizenship of directors, it should be included in the by-laws.

§ 194. General Powers

At common law the directors have entire charge of the property and affairs of the corporation with full power and authority to manage and conduct the same. The statement of the general powers of the directors as it usually appears in the by-laws is therefore nothing more than a reiteration of the conditions as they exist, brought into the by-laws as a matter of information. If the powers of the directors are materially modified or restricted by the statutes, by the charter of the corporation, or by the by-laws themselves in other parts, the by-law statement of general powers should be drawn to correspond. (See §§ 149, 150.)

§ 195. Term of Office

The statutes in most states provide that the directors shall be elected annually, and shall hold over until their successors are elected and qualify. When the statutes so provide, no by-law provision for a longer term would be valid. In many of the states, however, classification whereby only part of the directors are elected each year is provided for. The by-laws should in any event contain provisions as to the term of office of the directors, and the provision that they shall hold over until their successors are elected and qualify.

§ 196. Classification

The usual object of a classification of directors is to provide against any radical action or sudden alteration of policy

that might occur if the whole board were changed at one time. In perhaps the greater number of states it must, when desired, be secured through by-law provision.

To be effective, any such classification of directors must be permanent and therefore, wherever possible, should be by charter provision. If dependent only upon the provisions of the by-laws, a majority of the stockholders might at any time assemble with due formality, repeal the by-laws in question, and thereby abrogate the whole arrangement. (See § 151.)

Classification in a small or close corporation is generally a useless and somewhat troublesome formality.

§ 197. Removal

It may infrequently happen that the stockholders wish to have more control over the board than they have under the common law, and wish to reserve to themselves the power of removal of directors without the troublesome procedure necessary to remove them for adequate cause.

If the statute does not give them this power, and their charter does not, provision may be made in the by-laws, and a director accepting office under a by-law giving the stockholders power of removal will be bound thereby.[1]

§ 198. Vacancies

The board of directors is usually given power to fill vacancies occurring in its own body. Unless, however, it is so provided by statute, charter, or by-laws, the board does not have this power, and in such event the power is reserved to the stockholders. Any vacancies in the board must then either wait until the next annual meeting with its election of directors, or be filled by a special election, the stockholders being called together for the purpose.[2]

[1] Douglass v. Merchants' Ins. Co., 118 N. Y. 484 (1890); Raub v. Gerken, 127 App. Div. (N. Y.) 42 (1908).

[2] *In re* Griffing Iron Co., 63 N. J. L. 168, 357 (1899).

As long as the board can assemble a quorum of its entire membership, it may continue to act despite vacancies, but it is safer to keep the membership up to the prescribed quota, and it is almost an invariable rule to give the board the power to fill vacancies as they occur. In this way the board is self-perpetuating in the intervals between the annual meetings.

The usual board vacancies provided for by the by-laws are those caused by death or resignation. Beyond this the by-laws might very properly provide that continued absence from meetings of the board should, in itself, vacate the position of the absentee director. In such case the by-laws should specify the exact number of consecutive absences from regular meetings, or from regular and special meetings, necessary to create a vacancy.

By-laws sometimes provide that in case the membership of the board falls below the number required for a quorum, so that the board is unable either to transact business, or to fill the vacancies and thereby re-establish a quorum to enable it to transact business, a special meeting of the stockholders shall be called to elect such number of directors as may be necessary to restore the board to its normal membership.

§ 199. Meetings

The frequency of regular meetings of the board is to be decided by the particular conditions. Monthly meetings are usual, but in close corporations with a small board it is often unnecessary to meet regularly more than once in each quarter, or even once each year. In case of any emergency requiring action, a special meeting of a small board can be quickly and easily called.

The by-laws should provide the time and place of regular meetings of the board, and should make provision for calling special meetings. The nature and formalities of the call necessary to summon a special meeting of the board are purely

matters for the corporation to determine. Usually the president is given authority to call such meetings at his discretion. Generally it is provided also that such meeting shall be called upon written request of a certain number—usually two-thirds—of the directors. More rarely it is provided that a special meeting shall be called upon the written request of a certain proportion in interest of the stockholders.

Where the board is small, it is customary and advisable to provide that meetings may be held at any time and place and without previous notice by the unanimous consent, or unanimous participation of the board membership. Such a provision would usually be useless if the board were large.

The place of meeting should be fixed by the by-laws, though a proviso may be added that special meetings may be held elsewhere by unanimous consent of the board. The office of the corporation is the proper place for directors' meetings and they should be held there unless otherwise agreed by all the directors. To allow a majority of the board to call meetings in private offices, or in places difficult of access, or to permit of adjournment to such places, except by unanimous agreement, is to invite the gravest abuses.

§ 200. Notice of Meetings

It is supposed that members of the board are familiar with the date of regular meetings. Hence, there is not the same legal necessity for notice that exists in the case of special meetings. It is usual though, as a matter of convenience and to prevent such meetings from being overlooked, to provide that notice of regular meetings shall be given by the secretary, and, where specially important action is to be taken at any such meeting, notice of this is also usually given. In the more comprehensive sets of by-laws it is customary to add a proviso that failure to give such notice shall not affect the validity of the meeting or of any proceedings thereof. It is

not probable that the proceedings of a regular meeting of directors would in any case be invalidated on account of failure to give notice,[3] but the proviso is added out of abundant caution.

Special meetings, unless assembled with adequate notice, are not legally called and their action may be set aside. Requirements as to notice may, however, be waived and special meetings be held without notice by unanimous consent, or with the participation of all the directors. Business of any kind may be transacted at any meeting if all the directors have given written consent thereto or are participating in the proceedings and do not object.

Notices of special meetings of directors are usually sent by either mail or telegraph such reasonable time before the meeting as will, under ordinary conditions, permit the attendance of all the members of the board. The by-laws should prescribe the conditions of such notice. If it is desirable to notify directors of meetings by telephone, a provision authorizing such notice should be given in the by-laws. Otherwise, if anyone objected, such notice would not be legally sufficient. The by-laws also usually reiterate the common law rule that no business except that specifically notified in the call and notice shall be considered or acted upon at special meetings.

§ 201. Quorum

If the statutes are silent as to the number of directors requisite for a quorum, the charter or by-laws will control. If the statutes and also the charter and by-laws are silent, the common law controls and a majority of the full membership of the board is then requisite for a quorum.

If the matter is regulated by the by-laws, any desired number may be designated a quorum even though this number may be much less than a majority of the board. It is cus-

[3] But see Trendley v. Illinois Traction Co., 145 S. W. (Mo.) 1 (1912).

tomary and advisable, however, to require a majority of the entire board to constitute a quorum. Under such provision, any reduction in the membership of the board by death, removal, or resignation would not affect the number requisite to a quorum, which still remains the same.[4] The by-law should be carefully worded to avoid any misunderstanding on this or other points.

Directors, on the principle of *delegatus non delegare,* cannot appear at directors' meetings by proxy. However, as a matter of general law and to prevent misunderstandings and dissension, a statement might be included in this by-law that directors cannot be represented by proxies.

§ 202. Election of Officers

The by-laws should designate the officials of the corporation, the time of their election, and the period for which they are elected. It is also usual to provide that they shall hold office until the election and qualification of their successors, unless sooner removed by action of the board. It is also usually specified that election shall be by ballot, and that the board shall fix the compensation of officers and fill any vacancies that may occur among them.

In arranging the respective dates of the stockholders' annual meeting at which the directors are elected and the meeting of the directors thereafter at which the officers are usually elected, the latter meeting should not succeed the former so closely as to give inadequate time for the notification of newly elected directors. Frequently such directors' meeting will be arranged to follow the stockholders' meeting on the same day, but a few hours elapsing between the two meetings. If the board be small and any possible new members readily accessible, or if the entire membership be re-elected, the juxtaposition of the two meetings is immaterial. Where, however

[4] Erie R. R. Co. v. City of Buffalo, 180 N. Y. 192, 197 (1904).

these conditions do not exist, it may occur that some newly elected member of the board fails to receive notice of his election and of the subsequent directors' meeting in time to permit of his attendance. This might prevent the election of officers or invalidate it if held. For this reason the board meeting for the election of officers should, as a rule, be fixed at such date subsequent to the annual meeting as will give full time for the regular by-law notice of the board meeting.

It is customary and entirely proper to provide that the election of officers shall follow the election of the board with reasonable closeness, in order that the new board may without delay elect its own corps of officers.

§ 203. Removal of Officers

Speaking generally, if an officer is elected for a specified term he cannot be legally removed except for sufficient cause, and not then until he has had opportunity to appear in his own behalf. In a few states the power to remove officers at pleasure is given the directors by statute. Otherwise, if it is desired that the directors shall have the power of removal, it should be clearly conferred on them by the by-laws. The by-law giving the power should be explicit, and to be effective should provide for removal at pleasure with or without cause. If such power of removal is given the directors by the by-laws, each officer accepts his office subject to this regulation, knows upon what tenure he holds it, and may thereafter be removed at the pleasure of the board by a mere majority resolution.[5] (See § 221.)

§ 204. Compensation of Directors

Directors cannot claim any salary or compensation for their services as directors other than is expressly set forth in the by-laws.[6] Definite salaries might be fixed, but com-

[5] Douglass v. Merchants Ins. Co., 118 N. Y. 484 (1890).
[6] Godley v. Crandall & Godley Co., 212 N. Y. 121, 131 (1914).

pensation is usually provided in the form of a certain stipend for attendance upon meetings. The amounts paid for attendance at meetings vary, rarely falling below $5 or exceeding $25. Sometimes a certain fixed sum is appropriated for each meeting and is divided among the directors present. The whole matter is one that rests entirely in the discretion of the stockholders and varies in different corporations. (See § 220.)

§ 205. Power to Pass By-Laws

In many of the states the directors are, by statute, given extensive powers over the by-laws. Elsewhere it is a matter for charter or by-law regulation. It is doubtful whether it is wise in any case to allow the directors full power—as may be done by charter provision in New Jersey—to override by-laws passed by the stockholders. The only direct control of the stockholders over the affairs of the corporation is exercised through the by-laws, and, if the directors can repeal and abrogate these by-laws at will, they are practically unrestrained in their management of the corporate affairs.

At times it is undoubtedly advantageous for the board to have some power over the by-laws in order to provide for matters or emergencies not foreseen by the stockholders. All necessary power in this direction is, however, given when the board is allowed to pass by-laws in harmony, or not inconsistent, with those passed by the stockholders. Anything further is dangerous and susceptible of abuse. (See §§ 97, 150.)

§ 206. Order of Business

The order of business at directors' meetings is a purely formal regulation included in the by-laws as a matter of convenience. Although incorporated in the by-laws, it is not mandatory, and any item may be passed, or the entire regular order of business may be suspended or varied at the pleasure of the board.

CHAPTER XXIX

BY-LAW PROVISIONS RELATING TO STANDING COMMITTEES

§ 207. Purpose

In most of the larger corporations the board of directors is composed of many members. These are usually busy men, sometimes living in different parts of the country, and almost always difficult to assemble. Many of them are on the board for the sole purpose of representing special interests, and without peculiar qualifications or ability for the conduct of the particular corporate business. Under such circumstances the board is not an efficient instrument for the direction of the corporate affairs and something better adapted to the purpose is necessary. The standing committee fills this need, replacing the slow, cumbrous, and uncertain action of a large board with the prompt, positive, and effective action of a small selected committee.

Standing committees are permanent committees of the board of directors as opposed to committees of the board appointed for temporary purposes. The membership of such committees is seldom less than three or more than five. To increase this membership too greatly would involve the very ills the committees were created to avoid.

As many standing committees may be appointed as the conditions demand. In many cases the executive committee alone is found sufficient. In others a finance committee is added. It is but seldom that other standing committees are necessary.

If the executive committee is the only standing committee,

it is usually given all the powers of the board in the interim between board meetings, and becomes the active agent by whom these powers are exercised. If there is a finance committee, such matters as come within its purview will be reserved from the powers of the executive committee, and the two committees will then between them exercise all the powers of the board. In such case the executive committee usually controls in all general matters, while the powers of the finance committee are confined to the management and supervision of the corporate finances.

These standing committees, appointed with such powers, are the real managing bodies of the corporation, the board merely supervising their operations. They usually act and then report their action to the board. In some cases where they prefer to throw responsibility upon the board, or where some statute provision requires action of the board, or when it is desirable to lend added weight to a contemplated measure, they will report the matter to the board with a recommendation that the desired action be taken.

It is to be noted that sometimes an executive committee is provided when the board itself is sufficiently small to permit of prompt action and proper attention to the corporate business. In such case the committee may become of real injury to the corporate interests, the few members composing it managing the entire business of the corporation to the practical and improper exclusion of the board. In such cases the directors, as a body, usually lose interest, board meetings are neglected, and the executive committee controls without supervision.

In this same general direction is to be found the only danger to be apprehended from the employment of the standing committee: the possibility that it may be used as a convenient means for the elimination of the board—or certain elements of the board—from control of the corporate affairs,

the real management of the corporation being placed in the hands of the selected few who constitute the committees. This danger can be avoided only by careful definition and judicious regulation of the powers of these committees, this to be done in the charter or by-law provisions by which they are created.[1]

§ 208. Appointment

The standing committees are usually created and empowered, and the manner of appointing or electing their members prescribed, by charter or by-law provisions. Since the powers of the board are to a greater or less degree to be delegated to these committees, they must be composed of members of the board. The provisions as to the appointment of members are therefore confined to the manner of their selection from this body. Sometimes the creating provision will provide that certain officials of the board shall constitute the standing committees, as for instance that the president, vice-president, and treasurer shall constitute the executive committee. Generally the treasurer is designated as a member of the finance committee. Also it is quite usual to provide that the president of the company shall *ex officio* be a member of the executive committee, and sometimes it is provided that he shall be a member and the presiding officer of all standing committees. At times it is provided that the president shall appoint the different standing committees. The most common, and perhaps the safest, plan leaves the membership of these committees to be decided by an election in the board.

If there is any danger of the committees being used as a device to exclude minority interests from management of the corporate affairs, the charter or by-laws may prescribe such majority vote of the board for the election of their members as to require the aid of the minority to elect. A pro-

[1] See 3 Cook on Corp., § 715.

vision of this kind might result in a deadlock, but in that case the board would continue in the direct management of the corporate interests until some agreement was reached and acceptable standing committees elected.

There is no general rule as to the appointment or selection of officers for the standing committees. In some cases they are designated by the creating provisions, in others they are elected by the board, while in many cases the selection of officers is left to be decided by each committee for itself. It is probably simplest and most satisfactory to provide that the chairman of each committee shall be designated by the board. The only other necessary officer is the secretary. At times it is provided that the secretary of the corporation shall also act as secretary of the committees. If, however, there is more than one standing committee, and especially if these committees are active, it may be found advantageous for each committee to have a distinct recording official who may or may not be a member of that committee.

§ 209. Composition

The membership of the standing committees must be confined to the membership of the board, otherwise the power of the board to delegate its authority to the committees would be more than questionable, and the action of such committees be of doubtful legality.

Within this limitation, the standing committees should be formed on the principles of specialization. Those most familiar with the corporate business and most capable in its practical management will naturally be grouped as the executive committee. Those of most skill and standing in financial matters will properly be selected for the membership of the finance committee. Other considerations frequently intervene to prevent this ideal formation of the standing committees, but the nearer it is attained the better will be the results.

The creating provisions not uncommonly provide that the president, vice-president, and treasurer, with or without additional members, shall constitute the executive committee. These officers being elected by the board to the positions they already occupy, are presumably men of executive ability, familiar with the corporate affairs and therefore peculiarly qualified to act as members of the managing committee. On the other hand, such appointment adds materially to the responsibility, the power, and the importance of these officials and may for that reason at times be unadvisable.

The treasurer should obviously be a member of the finance committee unless special reasons to the contrary exist. If a member of the finance committee he should not ordinarily also act on the executive committee.

§ 210. Powers

There is no doubt that the board may legally delegate its authority to properly constituted standing committees.[2] This delegated authority may be co-extensive with the powers of the board in the interim between board meetings, or may be limited to certain specified actions or lines of action. It has been held that the "full powers" of the board in the interim between board meetings are limited to conducting the ordinary business operations of the corporation.[3] The extent of the power to be delegated to the standing committees is usually fixed by the charter or by-law provisions by which the committees are created, though it may be left to be determined by the board itself. If the powers of the standing committees are fixed by the creating provisions, the board cannot delegate powers in excess of those prescribed.

The creating provisions frequently go into detail as to the powers and duties of such committees. These powers

[2] The Sheridan El. L. Co. v. The Chatham Nat. Bank, 127 N. Y. 517 (1891); Kavanagh v. Gould, 147 App. Div. (N. Y.) 281 (1911).
[3] Hayes v. Canada, etc., S. S. Co., 181 Fed. 289 (1910).

should be carefully defined, and, speaking generally, should not be too extended. Standing committees should be required to keep full and adequate written records of their proceedings, and these records should be open to inspection by members of the board. Frequent reports to the board are desirable.

Properly constituted and empowered, and within the limits of their authority, standing committees act with the same binding force and effect as the board itself. Their contracts are not affected by any subsequent disapproval of the board, nor can the corporation refuse to carry out any of their proper undertakings.

§ 211. Procedure

The standing committees act as do other parliamentary bodies. Their usual officers are a chairman and secretary, and these officers perform the customary duties. Regular meetings may be provided for by the by-laws with full provision as to their conduct and record, or the matter may be left to the committees. Owing to their compactness and the manner in which they are constituted, the standing committees are easily assembled and a large portion of the business of such committees is usually accomplished in special meetings, either regularly called or assembled by unanimous consent.

All special meetings should be duly notified to the members, and in the case of "consent meetings" the consent or participation of every member must be secured. If it is desirable to notify members of meetings by telephone, a provision authorizing such notice should be made part of the by-laws. Otherwise, if anyone objected, such notice would not be legally sufficient. All decisions reached and action taken should be expressed in duly adopted resolutions, and minutes should be kept containing a faithful record of all committee

proceedings. These proceedings should from time to time be reported to the board, either by direct report or by the reading of the committee minutes. Vacancies in the committees should be filled as prescribed by the by-laws, usually either by the committee itself or by action of the board, except in the case of an ex-officio member, who succeeds to his position on the committee by virtue of his election to official position in the corporation without further formality.

A majority of a standing committee, unless otherwise expressly provided, constitutes a quorum, and a majority of that quorum has power to act.[4] A standing committee cannot delegate its power to one or more of its members, but must act as a board. It may be prudent to provide that the affirmative vote of a majority of the whole committee shall be necessary for action. This does not necessitate any increase in the number necessary to a quorum, but if a mere common-law quorum be present the affirmative vote of all the members present is required to secure action.

[4] Young v. Canada, etc., Co., 97 N. E. (Mass.) 1098 (1912).

CHAPTER XXX

BY-LAW PROVISIONS RELATING TO OFFICERS

§ 212. Enumeration

The term officers is here applied to those agents of the corporation appointed or elected—usually by the board of directors—as the direct executive representatives of the board and of the corporation. The directors are themselves at times styled officers, and with legal correctness,[1] but to avoid confusion the directors are not designated as officers in the present volume.

In regard to the corporate officers and their duties the statutes are usually silent, the charter seldom takes cognizance of anything pertaining to them, and the by-laws therefore control. Under these circumstances the stockholders as the by-law-making power have wide discretion. They fix the number, titles, qualifications, duties, method of election, and all other details relating to the officers, and their wishes as expressed in the by-laws prevail. If not covered in the by-laws, such matters are regulated by common or parliamentary law or custom, or, as to some of these matters, are determined by the directors.

The necessary officers of a corporation are the president, secretary, and treasurer. In the smaller corporations two of these offices are sometimes held by one person. In most cases, however, the number of officers is increased, according to the needs of the particular corporation, by the addition of one or more vice-presidents, a managing director or general manager, a chairman of the board, counsel, and an auditor. The officials named are, for the most part elective, and, with the oc-

[1] 1 Cook on Corp., § 10.

casional exception of the general manager, are supposed to report directly to the board or to one of the standing committees. The general manager in some corporations reports to the president or other designated official. Outside of the executive officials, other agents and employees are not officers, and but seldom come in contact with the board.

The election of officers naturally follows closely on the election of directors, and is usually held as soon thereafter as the newly elected board can be properly assembled.

The president and vice-president are chosen from the board itself, as they may be called upon to preside at its meetings. This is not necessary in regard to the other officers, though the treasurer is frequently chosen from the membership of the board, and other officials are so selected when convenient. The treasurer of the larger corporations is usually selected on the basis of his financial standing or ability. It would seem obvious that the corporate officials should all have special qualifications and a knowledge of the duties of their positions, though other considerations frequently prevail.

§ 213. Presiding Officers

The president is the usual presiding officer. His duties vary widely according to the size and character of the corporation. In the smaller corporations he is frequently assigned the active management of the business in addition to the duties more strictly pertaining to his office. In the larger corporations the duties incident to the president's office are frequently allotted in greater or less degree to other officers. If a chairman of the board exists, that official presides at all meetings of the board. If there is a chairman of the finance committee, he takes over the supervision and direction of the financial matters usually assigned to the president. At times certain of the duties ordinarily pertaining to the president are performed by the vice-presidents.

When the office of chairman of the board exists, its duties should be clearly defined by the by-laws. As the chairman of the board presides at meetings of the board, the general rule that the president must be a member of the board is not so imperative when a chairman is provided. Even in such case, however, if the president is to be the chief executive of the company, he must almost of necessity be present at meetings of the directors, participate in their discussions and deliberations, and should therefore be a member of the board.

Vice-presidents, designated and ranked as first, second, third, and so on, may be provided for in accordance with the corporate needs. These perform the duties of the president in the absence of that official, or of the ranking official, in the order of precedence. In addition, in the larger corporations active functions are usually provided for several of the vice-presidents. Frequently their number is swelled merely to afford honorary positions for members of the board. Heads of departments are sometimes made vice-presidents as a "broadening" measure, tending to avoid the friction and the jealousies that so often exist between departments. In the smaller corporations, the duties of the vice-president are sometimes assigned to the treasurer, or this latter is elected as vice-president and treasurer. (See §184.)

The presiding officers of the standing committees are usually provided for either by the by-laws or by action of the board, but are sometimes left for the committees to elect. The president of the company is usually president of the executive committee; the treasurer is frequently placed at the head of the finance committee.

§ 214. Secretary

The duties of the secretary should be fully and explicitly prescribed in the by-laws, especially as to signatures. He would naturally have charge of the corporate seal and affix and

attest it when necessary, though the president is occasionally authorized thereto as well. Unless the statutes call for the signatures of the president and treasurer to stock certificates, the secretary is commonly designated to sign such certificates with the president. He generally has entire charge of the details of the issue and recording of stock. The corporate records are entrusted to him, and the various state reports are usually prepared by him. His powers and duties as to signing contracts are entirely dependent upon the by-laws or conditions of the particular corporation. Usually he sign with the president, but frequently the president signs alone or with the treasurer, or the matter is decided in each important instance by resolution of the board. When the secretary's signature is not affixed to sealed contracts, it should appear on such instrument in attestation of the seal.

§ 215. Treasurer

The treasurer is usually given full charge of the corporate finances and all that immediately relates thereto; also the custody of all corporate instruments and evidences of value. He signs all checks, with or without the president as the by-laws or directors may prescribe, and participates in the execution of all instruments pertaining to the financial transactions of the corporation. The by-laws should clearly define the extent of the treasurer's powers and responsibilities.

Whenever the treasurer's position involves the handling or possession of large sums of money, or of considerable property values, he should be required to give bond. In a small corporation, or one where the responsibilities of the treasurer are light, such requirement is an unnecessary formality.

The finance committee, if such a committee exists, takes on itself many of the duties and responsibilities of the treasurer, and, unless that official is chairman of the finance committee, renders his position much less onerous.

§ 216. Managing Officers

The position of managing director is found only in the larger corporations, and the position and duties of this official are often somewhat indeterminate. In some case his duties are practically those of the general manager; in others he is given much of the power and many of the duties of the president. At times the position is in the nature of a compromise, the duties of the managing director being carved from those of the president and general manager.

The position of managing director is supposed to be more dignified than that of the general manager. Its duties should be clearly prescribed by the by-laws in order to prevent possible conflicts of authority. This is the more necessary, as the duties of the position are not so definite or so well understood as those of the other officials, and custom cannot be referred to for missing details.

The general manager is accounted an officer of the company—in contradistinction to the employees—only because he is selected by and usually reports to the board. His position generally differs materially from that of the other officials. At times he is instructed to report and act under the direction of the president, and, if the by-laws did not specifically provide for the election of a general manager, the directors would have authority to appoint or employ such official and prescribe his duties and salary, just as they might employ any other necessary agent or employee of the company. In such case the usual laws and customs relating to his employment would control.

§ 217. Counsel; Auditor

In the larger corporations an attorney is usually retained as a regular and permanent feature of the management. Such official has no original powers, even his control of litigation being subject to the direction of the board, or, if it be so referred, to one of the standing committees.

In the smaller corporations by-law provision for counsel is not usual, the board being left to employ legal assistance at such times and on such terms as it may deem expedient. The employment of counsel then becomes merely a matter of contract.

The compensation of counsel, when regularly retained, is usually fixed at some minimum amount, which is considered a retainer, any further payments depending upon the services rendered.

The auditor is usually an essential officer of the larger corporations. Where the work that may properly be referred to the auditor is not sufficient to justify his regular employment, the by-laws may provide for periodical audits, or the whole matter may be left to the discretion of the board. Where the volume of corporate business is at all large, the employment of an auditor or some provision for suitable audits of the corporate books and accounts is a usual and advisable precaution.

§ 218. Assistant Officers

The president is usually well provided with assistants in the vice-presidents. An assistant treasurer is not unusual. In the larger corporations an assistant secretary is frequently appointed.

Such official duties as the board may deem expedient are delegated to these assistant officers, or their duties may be prescribed at discretion by the officials they assist. In any event, the by-laws should clearly prescribe their status and manner of appointment. If these assistant officers are to perform the duties of their principals in the absence of these latter, the by-laws should so prescribe.

In the smaller corporations assistant officers, outside of the vice-presidents, are an unnecessary and possibly complicating addition to the corporate mechanism.

§ 219. Delegation of Official Powers

Exigencies may arise in which it may be desirable or even necessary for one corporate official to exercise the powers and perform the duties of another, in whole or in part. The board would have authority to delegate temporarily the powers of certain officers under such circumstances without special by-law provision, but, to save question and possible trouble, the power, if likely to be necessary, should be specifically conferred by the by-laws. One official cannot delegate his powers to another, even temporarily in any material matter, unless specially authorized thereto by the by-laws or action of the board.

§ 220. Salaries

Unless it is specified that officers are to receive salaries, they are not, as a rule, entitled to charge for their official services.[2] Neither is it ordinarily legal for the directors to vote compensation for such official services after they are performed.[3] To avoid misunderstanding, however, the conditions, whatever they may be, should be clearly stated in the by-laws—that the officers of the corporation shall receive no salaries, or that the officers shall receive only such compensation for their services as the board may designate at the time of their appointment, or that the officers shall receive the specified salaries, stated in the by-laws. The whole matter is one to be adjusted from a business standpoint and much trouble is likely to be saved by a definite arrangement.[4]

If, however, such an officer is neither stockholder nor director of the company and stands in no relation which would make it his interest to serve without compensation, there will be a *prima facie* obligation to pay him.[5]

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[2] Hayes v. Canada, etc., S. S. Co., 181 Fed. 289 (1910).
[3] Lewis v. Matthews, 161 App. Div. (N. Y.) 107 (1914); Ellis v. Ward, 137 Ill. 509 (1890).
[4] See Henry Woods Sons' Co. v. Schaefer, 173 Mass. 443 (1899); Met. El. R. Co. v. Kneeland, 120 N. Y. 134 (1890).
[5] Smith v. Long Island R. R. Co., 102 N. Y. 190 (1886).

Officers who are also directors cannot vote salaries to themselves even though they are also holders of a majority of the stock.[6] But an officer who is also a stockholder and director may recover for services rendered outside his official duties if such services are authorized by the directors.[7]

§ 221. Removals; Vacancies

The power to remove officers and to fill vacancies among them, when given the directors, is usually provided for in the by-laws under the head of "Directors." (See § 203.) It would be proper, however, to repeat any powers given the board in this direction, in a short by-law under the heading of officers, or the ground might be covered by a reference to the by-law by which this power was conferred. If the occasion arises for the exercise of the power of removal, or it becomes necessary to fill a vacancy, there should be no possible basis for any doubt or question as to the authority of the board to act.

[6] Jacobson v. B. Lumber Co., 184 N. Y. 152 (1906); Davids v. Davids, 135 A. D (N. Y.) 206 (1909).

[7] Bagby v. Carthage, etc., Co., 165 N. Y. 179 (1900); Corinne Mill Co. v. Toponce, 152 U. S. 405 (1893).

CHAPTER XXXI

BY-LAW PROVISIONS RELATING TO DIVIDENDS AND FINANCE

§ 222. General

All those by-law provisions directly relating to the financial management of the corporation are usually grouped under the general heading of "Dividends and Finance." Any desired limitations on the control exercised by the directors over the finances of the corporation, and any directions as to the management of these finances, must, unless incorporated in the charter, appear in the by-laws. Otherwise the directors are in complete control, except as restrained by statute law.

It is to be noted that any restrictions on the salaries of officials, if of a general nature, should appear in the by-laws relating to finance. If the amount of each official salary were fixed, such limitations might appear under "Dividends and Finance," but would also be included in the by-laws relating to the officers affected.

§ 223. Dividends

By-law provisions as to dividends are for the most part merely declaratory of the common or statutory law on the subject. Their inclusion in the by-laws is very desirable, not only on account of the importance of the matter, but because the statutory or common law provisions against illegal dividends are otherwise frequently overlooked or disregarded.

§ 224. Reserve Funds

In most of the states the directors have full power, unless otherwise provided by charter or by-laws, to set aside any

portion or all of the corporate profits at their discretion, as a reserve fund or for the purpose of accumulating a working capital. In New Jersey, on the contrary, the directors, unless otherwise expressly authorized by charter or by-laws, must annually distribute all the corporate profits as dividends. Such compulsory distribution of profits might at times be prejudicial and even disastrous to the corporate interests, and accordingly, it is usual in New Jersey to authorize the accumulation of a reserve fund by charter or by-law provision.

In other states the matter of reserves is sometimes left entirely to the discretion of the directors, but is usually regulated by suitable provisions in the by-laws. The minimum reserve fund to be maintained will be prescribed, in which case no dividends must be paid while the reserves are below this minimum, or a stipulated annual dividend will be required from the annual profits before anything is passed to the reserve, or a certain percentage of the annual profits will be passed to the reserve fund. Whatever the arrangement it should be so clearly expressed as to admit of no misunderstanding.

§ 225. Limitations of Debt

By-law restrictions upon the power of the directors to incur debts are not uncommon. These limitations are of various forms. At times the debt-incurring power of the board will be limited to a stated gross amount which must not be exceeded without special authorization by the stockholders; or it may be provided that such limit of indebtedness shall not be exceeded unless authorized by a specified majority of the directors, as a two-thirds vote of the entire board, or perhaps by unanimous action of that body. Occasionally the board will be restricted as to the amount of any one contract or obligation, as for instance that no contract or obligation involving liabilities of more than $10,000 shall be entered into

or incurred by the board unless specifically authorized thereto by resolution of the stockholders.

The advisability of such limitations is open to question. Peculiar cases will undoubtedly arise where such restrictions are desirable, and at times they are necessary, but as a general rule it would seem better to elect a responsible board rather than to attempt to place restraints upon its action. (See §§ 149, 158.)

§ 226. Bank Deposits

The by-law provisions as to the corporate bank deposits are important and should be very explicit in their terms. They should prohibit absolutely any irregular retention or disposition of the funds by the treasurer, and provide that all moneys coming into his hands be promptly deposited in the name of the company. This latter point should be covered specifically and clearly by the by-laws, as the practice of allowing deposits to be made in the individual name of the treasurer, or in his name as treasurer, is a standing invitation to irregularities and resulting trouble.

The by-laws should also prescribe the signature to corporate checks. Practice varies as to this matter but unless there is reason for doing otherwise checks should be signed with the company name, affixed by the treasurer and verified by his signature, with usually a countersignature affixed by the president.

The by-laws relating to bank deposits should cover the ground fully and clearly, leaving nothing to the discretion of the board or finance committee save the designation of the depositaries.

CHAPTER XXXII

SUNDRY PROVISIONS

§ 227. General

Under this head will come all those by-laws that cannot be included under the titles already discussed and that are too few or unimportant to justify separate classification. Some of these matters are of particular application. A few of general application are found in all complete sets of by-laws and are considered in the following sections of the present chapter.

§ 228. Corporate Seal

It is customary to prescribe the details of the corporate seal in the by-laws, the provision being usually so worded as to serve as a formal adoption of the described seal. This seal usually gives the corporate name, the year, and the state of incorporation. These are customary, but unless prescribed by statute are not essential, as any other wording or device, if properly adopted, would be the legal seal of the corporation. Any additional designs, mottoes, or ornamentation may be added as desired and will neither add to, nor detract from, the legal effectiveness of the seal.

§ 229. Penalties

The enforcement of by-laws by means of penalties is of doubtful utility. Cases may arise where penalties may be profitably employed, but usually such measures are futile and inadequate. Where the power of removal exists, persistent disregard of the by-laws by officials of the corporation would

undoubtedly be proper grounds for the exercise of this power. If such power is not given by the by-laws or statutes, official disregard of the by-laws would probably be sufficient reason for a removal on common-law grounds. If the directors act in disregard of the requirements of the by-laws, such action is illegal, and the personal liability that may follow is a much more effective penalty than anything that could be inflicted by direct by-law provision.

§ 230. Amendments

The usual by-law provisions on this subject require majority action of the stockholders for amendment of the by-laws. This conforms to the provisions of the common law. Where greater stability is desirable on account of special provisions incorporated in the by-laws, or generally as a protection to minority interests, it is sometimes provided that two-thirds in interest, or even a larger proportion of the stockholders, must vote in favor of any amendment before it is effected.

Such provisions, merely made part of the by-laws, unless reinforced in some way are of but little avail. The majority have the right to amend and repeal the by-laws, and it cannot be taken from them by a mere unsupported by-law inhibition.[1]

Such a provision, to be effective, must either be incorporated in the charter, or, if in the by-laws only, must be so established and confirmed by vested rights accrued under it as to have become in effect a contract between the corporation and the stockholders. When this is done the by-law becomes unchangeable, except in accordance with its own provisions. As stated in a noted New York case:[2]

A private corporation cannot repeal a by-law so as to impair rights which have been given and become vested by

[1] Smith v. Nelson, 18 Vt. 511 (1846).
[2] The New York Court of Appeals in Kent v. Quicksilver Mining Co., 78 N. Y. 159 (1879).

virtue of the by-law; and this although the power is reserved by its charter to alter, amend or repeal its by-laws.

This is stated yet more strongly in a New Jersey case,[3] a case where stock had been sold on the strength of the safety afforded by special charter and by-law provision, where the court states the settled law to be:

"That the certificate of organization and the by-laws contemporaneously adopted, constitute a contract between the stockholders, and that it is not competent for the legislature to authorize either to be changed without the consent of all the stockholders, except it be done in the mode provided by the by-laws themselves."[4]

It is worthy of note that it has been decided in Pennsylvania that the by-laws cannot be amended by a majority of the stockholders at an annual meeting in any important particular, such as an increase of directors, unless the notice of that meeting informed all the stockholders that such action was contemplated.[5]

[3] Loewenthal v. Rubber Reclaiming Co., 52 N. J. Eq. 440, 441 (1894).
[4] See also Mills v. Cent. R. R. Co., 41 N. J. Eq. 1 (1886).
[5] Bagley v. Reno, etc., Co., 201 Pa. St. 78 (1902).

Part VII—Organization Meetings

CHAPTER XXXIII

FIRST MEETING OF STOCKHOLDERS

§ 231. General

In the great majority of the states, procedure for the organization of a corporation is uniform as to the main features. First, the charter is prepared and is executed by the incorporators; next, this duly executed charter is filed with the officials prescribed by statute; then the meeting of incorporators is held, by-laws adopted, directors elected, and such other action taken as may be necessary. The directors then meet, elect the officers of the corporation, and its organization is complete.

In a few states, however, this procedure is practically reversed, the election of directors and officers and adoption of by-laws preceding the filing of the charter. In other words, the by-laws are adopted and directors and officers elected before the corporation has any legal existence. The arrangement seems somewhat illogical, but is prescribed by the statutes of certain states and in those states must be followed. It merely amounts to a preliminary determination of these details, of no force unless the charter application is allowed, but then becoming automatically effective and binding on the new corporation. This variation of the usual procedure is found in Maine, Massachusetts, and some other states. In these states the proceedings outlined in the present and follow-

ing chapters must be modified to meet the statute requirements.

Under the customary procedure, the duly prepared charter application, accompanied by the proper fees, is submitted to the official designated by the statutes, for approval and filing. After the application has been approved and filed and this has been notified to the incorporators, these latter are authorized to assemble and perfect the organization of the new corporation.

The incorporators or their proxies are the only persons entitled to act at this time. Their power to call the first meeting and to act thereat for the corporation is derived from the recognition and express authorization given them by statute. If their subscriptions are set forth in the charter itself, each incorporator votes at this first meeting in accordance with such stock subscription, one vote for each share subscribed for. In those states where the first meeting is held before the charter is granted, each incorporator is usually entitled to but one vote in the organization meeting.

There may be numerous subscribers to the stock of the new corporation who are not named in the charter, but these subscribers are not yet stockholders of the corporation, and do not become stockholders and are not entitled to any participation in its affairs until after express acceptance of their subscriptions by the corporation.

Unless there is some good reason to the contrary, the number of incorporators is usually fixed at the minimum allowed by the statutes. This is done purely as a matter of convenience and as simplifying the formalities preliminary and incident to the first meeting.

Where the number of incorporators is small, the first meeting is most conveniently assembled by means of a written call and waiver of notice (See Form 31) which must be signed by all the incorporators. This call and waiver fixes

the time and place of meeting, and should also specify the business to be transacted thereat, though, by reason of all the interested parties signing, so much particularity is not necessary as in the call for the usual special meeting. A blanket phrase consenting to the transaction of any and all business brought before the meeting is in this case allowable and authoritative. Such a call and waiver, to be effective, must be signed by every incorporator at or before the time of meeting. If it is not, a meeting held pursuant thereto is not legally called and its proceedings are liable to be set aside.[1] The call and waiver need not be issued or signed at any definite time before the meeting, as it is a waiver of all statutory requirements of notice. A meeting assembled by means of a duly signed call and waiver and properly conducted is legal in any state of the Union. Often the call is signed at the meeting as the first order of business.

Where for any reason the call and waiver of notice cannot be used, any form or method of procedure prescribed by the statutes for the assembling of the first meeting should be followed to the letter. If no form is prescribed by the statutes it will be necessary for a majority of the incorporators to unite in a call for the first meeting. (See Form 31.) This call must fix the time, place, and business to be transacted at the meeting, and must be served on the incorporators who have not signed the call. Any convenient place of meeting may be selected, the time of notice must be sufficient to permit all the incorporators to be conveniently present, and the business to be transacted should be set forth in detail. The meeting is practically nothing more than a special meeting of the stockholders, and, in the absence of statutory prescription, its notice should follow the general rules in regard to notice for special meetings. (See §§ 183, 184.)

[1] Braintree, etc., Co. v. Braintree, 146 Mass. 482 (1888); Holcombe *et al.* v. Trenton White City Co., 82 Atl. (N. J.) 618 (1912).

§ 232. Preparation of Minutes

The first meeting of stockholders, and usually the first meeting of the directors as well, is of the cut-and-dried order. In most cases the incorporation is undertaken for a specific purpose and usually by certain people, who have already settled among themselves just how the corporation is to be organized in all main details. The organization meetings are merely a formal execution of these prearranged plans. It is therefore customary to have the minutes of these first meetings written out in advance and often with much particularity. (See Form 30.) The advantages of the plan are found in the orderly procedure thereby outlined, the better presentation of the matters to be considered, and the inclusion of all matters that ought to be considered. If anything occurs at or during the time of the meeting to modify the minutes as already written, the necessary changes are quickly made on the prepared draft by erasure or interlineation, and are properly incorporated in the minutes when these are entered in the minute book.

§ 233. Conduct of First Meetings

The manner of conducting the first meetings varies widely with the conditions. In certain cases, where everything is settled in advance and is to be kept in the precise shape determined upon, the entire minutes are put in final shape before the time of meeting. Then the attorney, or other party having the incorporation in hand, after due assembling of the incorporators, reads to them these cut-and-dried minutes as the proceedings of the meeting. With the assent of those present, or in the absence of express objection, the minutes so presented are declared to be the minutes of the meeting, which is thereupon adjourned. The minutes are then transcribed in the minute book, are signed by the parties respectively mentioned in the minutes as the presiding officer and secretary,

and the matter is closed. The directors' meeting is conducted in the same perfunctory manner and with the same precision of result.

This method though informal and irregular cannot be said to be illegal. The presence of all the parties in interest and their assent and active participation, acts to estop them from objecting to the proceedings and no one else would have the right to object.

It is needless to say that when this method is employed the incorporators are frequently dummies, who, after the completion of the organization, step aside and make way for the real parties in interest.

When the exact proceedings of the minutes are to be carried out, but the attorney in charge does not wish it to be so purely a matter of form, the minutes will be read but the parties named therein will go through the indicated motions. Thus, if the minutes state that the charter is presented by the president, or chairman, a copy of the charter will be handed the party named in the minutes as the presiding officer and the minutes verified by its due presentation to the meeting. Likewise the parties named as making and seconding motions will be asked if they make and second such motions, their ready assent usually verifying the predictions of the minutes to a nicety. Also, as each motion is reached in the reading, the meeting will be asked if it favors such motion, the assent of the meeting usually being readily obtained. Such a meeting is less of a legal fiction than the meeting conducted entirely by the reading of the minutes, and is to be preferred.

Where the real parties in interest participate in the first meetings, the proceedings are not usually of such a perfunctory nature. The minutes then serve more as a detailed order of business and are varied as the needs of the occasion seem to indicate. The presiding officer really presides, the secretary performs his functions, motions are made, the necessary

elections actually take place, discussions are in order if the necessity arises, and, in short, the assemblage is a meeting intelligently acting, and not a collection of dummies, useful mainly as pegs upon which to hang the prescribed proceedings.

In the comments which follow, it has been taken for granted that the actions of the meeting are to be really taken.

§ 234. Opening the First Meeting of Stockholders

At the duly appointed time and place, the incorporators or a majority of them, having assembled, some one of those present calls the meeting to order, and, in the absence of objection thereto, calls on some other incorporator present to take the chair. If there is any objection to the appointee, or to the selection of a chairman by appointment, the party calling the meeting to order should let the matter be decided by vote. The chairman, as soon as his appointment or election is announced, takes charge of the meeting and, if there is no objection thereto, appoints some one present to act as secretary. If there should be any objection to the chairman's appointment of a secretary, it will be necessary to settle the matter by vote. The secretary, as soon as appointed or elected, will note the names of those present and ask for the proxy of any incorporators not present in person. It is always desirable to have all the incorporators represented at this first meeting in person or by proxy, though a majority in interest can legally act if properly assembled.

The next step is to show that the meeting has been properly called. This is a matter for the secretary. If it has been assembled by call and waiver signed by all the incorporators, this call and waiver should be produced, be given to the secretary—if not already in his possession—and be ordered entered on the minutes of the meeting. If called by publication, copies of the newspapers in which the notice appeared, or the affidavit of the printer, are adequate evidence.

If called by notice served personally or by mail, a copy of the notice should be presented, accompanied by a certificate of the party by whom it was served that such service was duly effected. If the meeting assembled in any other way, the procedure and the evidence that it was properly carried out should be laid before the meeting and should appear in the minutes. The legality of the meeting should be shown by its record.

§ 235. Reception of Charter

The chairman or secretary should now produce a copy of the certificate of incorporation, and report the fact and date of its allowance, its filing in the office or offices required by the statutes, and the payment of the required fees. It is not essential that this copy of the charter be certified by the Secretary of State, though such certified copy is customarily procured and is generally more satisfactory to the interested parties than an uncertified copy.

When the charter is presented a motion is in order that the certificate of incorporation as presented be accepted or received and spread upon the minutes as a part of the record of the meeting. The charter is entered preferably on the first pages of the minute book, followed by the by-laws, with the other instruments that are made part of the record following the minutes proper, each beginning at the head of a page. So arranged, these instruments are much more easily found and referred to than if incorporated and buried in the body of the minutes. Also the minutes themselves are clearer and more intelligible if not broken up by the interjection of the lengthy instruments ordered spread upon the minutes. The legal effect of the entry of these instruments in the way indicated is exactly the same as if they appeared in the context. The minutes should, of course, note in the proper place the action on these instruments, and refer to the pages of the minute book on which they are entered.

§ 236. Adoption of By-Laws

The by-laws are usually prepared in advance of the first meeting and have been fully considered by those interested. (See § 173.) At the time of the meeting, they are presented, read article by article by the secretary or by such other person present as may be designated by the presiding officer, and adopted as a whole. At times each article will be adopted as read, followed by the adoption of the by-laws as a whole, though this is not a necessary formality.

If serious objection is offered to any of the by-law provisions, such objection will be taken under consideration by the meeting and any proposed modifications settled by formal action. As the time at this first meeting is, however, usually fully occupied with routine procedure, such matters cannot be given the consideration they deserve and any objections or suggestions in regard to the by-laws should be discussed, and, if possible, settled before the meeting.

Where the by-laws have been fully considered by the interested parties in advance of the meeting and all are familiar with their provisions, the reading of the by-laws may, either by unanimous consent, or by formal motion, be dispensed with and the by-laws adopted as presented and as a whole. The reading of the by-laws before adoption is, however, the safer plan, preventing disagreement later as to just what was adopted.

§ 237. Election of Directors

In most of the states the election of directors properly follows the adoption of the by-laws, such election being the only method by which the directors may be properly designated and empowered. In New York and in some other states, however, the directors for the first corporate year are named in the charter. In New York these directors have certain powers as to adoption of by-laws. In such case no action in

regard to the directors is necessary at the first stockholders' meeting, and, indeed, the first meeting loses much of its importance, as the board is already in existence with full power to make by-laws and to take up and manage the affairs of the corporation. A prompt first meeting of stockholders is, however, still advisable, as otherwise the board must adopt by-laws of more or less completeness and may be forced to take other action which is better taken by the stockholders.

Where directors are to be elected at the incorporators' meeting, any statutory directions must be followed exactly and the minutes should show in detail that this has been done. In the absence of statutory provisions, an election by ballot, conducted by tellers appointed by the presiding officer, is legal and proper. In such case the meeting is the judge of the qualifications of voters, and each incorporator or other participant votes according to the number of shares of stock subscribed for by him. If an agreement exists as to the parties to be elected as directors, these parties might be nominated by the meeting, and the secretary by motion be instructed to cast the vote of the meeting for the parties so nominated.

§ 238. Exchange of Stock for Property

The board of directors is the proper and final authority to conclude an exchange of stock for property. Where, however, as is often the case, a large proportion or possibly all the stock of the corporation is to be issued in payment for some particular property, it is customary and advisable to have the proposed purchase sanctioned and authorized by express action of the stockholders. Such action if unanimous commits all the stockholders to the purchase, and estops the participants from later objection to the transaction. The incorporators also usually specifically approve the price at which the property is taken over. This is a desirable precaution.[2]

[2] McBryan v. Elevator Co., 130 Mich. 111 (1902).

The proposal for exchange of stock for property is usually presented to the meeting, read, discussed if desired, and then a resolution passed approving the proposed purchase, referring it to the directors and instructing them to consummate the same.

§ 239. Other Business

Usually there will be other business to come before the stockholders at this first meeting, depending upon the conditions surrounding the particular corporation. In some states, specific action is required of the stockholders by the statutes. If there is any action to be taken by the directors in which there is doubt of their power, or in which some advantage is to be gained by an authorization from the stockholders, the necessary action should be taken at this time. Beyond this it is not advisable for the stockholders to go. All matters of general management are in the hands of the board, and any uncalled-for action in regard thereto on the part of the stockholders can have no advantageous results and may embarrass the proper action of that body.

CHAPTER XXXIV

FIRST MEETING OF DIRECTORS

§ 240. Calling the Meeting

In the majority of the states, the directors of a new corporation are elected at the first meeting of stockholders, and, of necessity, the first board meeting is held subsequent thereto. Even in those states where by charter appointment of the board that body might meet in advance of the first meeting of stockholders, it is the general practice for the meeting of stockholders to come first.

At their first meeting the stockholders usually adopt by-laws. The board in its first meeting has therefore the guidance of these by-laws so far as they apply. As the first meeting of the board is not a regular meeting, it is governed by the by-law provisions relating to special meetings, except as variations are made necessary by the unorganized condition of the board at this time.

No secretary having as yet been elected, the meeting cannot be called or assembled as it otherwise might, but must be assembled by a call signed by a majority of the members of the board, such call being in its general form similar to the usual call for special meetings and complying in every way with its requisites (see Form 40); or otherwise, and as is usually done, the meeting may be assembled by a written call and waiver of notice signed by every member of the board at or before the time of the meeting (see Form 36). Signatures affixed after the time of the meeting have been held non-effective.[1]

[1] Holcombe *et al.* v. Trenton White City Co., 82 Atl. (N. J.) 618 (1912).

The call, or call and waiver, as the case may be, should specify the time and the place of meeting, and give in detail the various matters to be considered and acted upon. If the stockholders have selected any office or definite headquarters for the new corporation, the meeting of the directors will naturally be called for that place; if not, any convenient place is proper. Often the office of its attorney is chosen. The most important matters for consideration at this meeting are the election of officers, the issuance of stock for property—where this is to be done—and the authorization of any proceedings necessary to the commencement of business. A blanket provision permitting the transaction of any and all business pertaining to the affairs of the corporation should be included in the call and waiver. Signed by the entire membership of the board this provision is effectual and permits action on any corporate matters that may come up for consideration. At times this latitude of action is of considerable advantage.

§ 241. Minutes

As in the case of the stockholders' first meeting, the proceedings of the first meeting of directors may usually be anticipated and minutes be prepared in advance with considerable accuracy. Occasionally in such case the minutes are prepared in permanent form and the proceedings conducted in accordance by a mere reading of these minutes—their adoption as the minutes of the meeting being signified by silent acquiescence, by express assent, or by a more particularized assent on each important point as the reading progresses. Usually, however, the prepared minutes are used more as memoranda, the meeting going through the motions at least of transacting the outlined business. (See Form 35.)

It is hardly necessary to say, that "cut and dried" minutes should not be prepared or used where there is any probability of a difference of opinion in the board. Courtesy

would forbid, even if there were a decided majority in favor of the outlined action. Also, speaking generally, it would be neither politic nor advisable to ignore so openly the consideration and deliberation which should characterize board action in case of disagreement.

§ 242. Opening the First Meeting of Directors

When the board assembles in its first meeting it is unorganized and must therefore be called to order by some one of its members, who, on his own volition or at the request of other members, takes the initiative. This member merely calls the meeting to order, and, in the absence of objection, names a temporary chairman or presides until a temporary chairman is appointed or elected by the meeting. This chairman then takes charge of the meeting, a temporary secretary is at once appointed or elected, and the temporary organization of the board is complete.

The call, or call and waiver, or other authorization under which the board has assembled, should then be presented, and, if it appears that the meeting has been duly assembled, the evidence thereof should be ordered entered on the minutes. In the absence of objection this might be so ordered by the presiding officer, otherwise by formal action. As the meeting is a special meeting it is important that it shall have been properly called and that due record be made of this fact.

A roll call, or its equivalent, the recording of those present by the secretary, completes the opening formalities and the meeting is ready for business.

§ 243. Election of Officers

If, as is almost invariably the case, the officers of the corporation are to be elected by the board, their election is the first business before the meeting. The by-laws already adopted by the stockholders usually designate the officers to

be elected and the manner of their election, and these requirements should be strictly followed. Generally the election is by ballot. Candidates for the various offices might be severally nominated with due second thereto, but when, as is usually the case, all these candidates have been agreed upon in advance, formal nominations are dispensed with and the details of election taken up at once. Where all are agreed, a motion is frequently passed instructing the secretary to cast the single ballot of the meeting for the recited list of officers. This is proper and, at times, convenient.

If the election is to be carried out in detail, the presiding officer will, in the absence of objection, appoint tellers. The members of the board then prepare their respective ballots and the tellers collect and count these ballots and announce the results. Each officer may be balloted for separately, or, as is usually the case, one ballot be made to serve for all the officers.

Immediately after the election the newly elected president and secretary, if present, take charge of the meeting and assume their respective official duties. If, however, these officials-elect are absent, or if anything prevents their immediate assumption of their duties, the temporary officers will continue to act until the close of the meeting, unless the permanent officers sooner take charge. If, as in New Jersey, the secretary is required to be sworn, he should comply with this requirement before undertaking to act in his official capacity, though his failure so to do would not vitiate his records, nor affect in any way the legality of the meeting.

§ 244. Adoption of Stock Certificate

The stockholders may, if they so desire, either by resolution or by-law provision, adopt a form of stock certificate. The matter is one, however, that is usually and better left to the discretion of the board. Frequently temporary certificates

are adopted, to be replaced later by more elaborate permanent certificates. Changes of conditions may occur necessitating change in the certificate originally adopted. Other contingencies affecting its form not infrequently arise. For these and other reasons the matter is one best handled by the board.

Frequently a form of stock certificate is selected and possibly printed or engraved before the time of the first board meeting. Even if this be so, the selected form should be formally adopted, and either the secretary should be authorized and instructed to procure the necessary books of stock certificates, or, if the books have already been procured, such action should be ratified and the books as presented be accepted. The resolution by which this is effected should also authorize the secretary to provide a seal, minute book and such other corporate books and stationery as may be required. (See Form 35.)

The form of seal is customarily determined in the by-laws which have already been adopted by the stockholders. If this is not the case the form of seal should be selected and adopted by the directors.

§ 245. Acceptance of Subscriptions

Subscriptions made by the incorporators of a new company need no formal acceptance. The mere fact of their having executed the charter, in which their subscriptions usually appear, and of having participated in the organization meetings, obviates the necessity of acceptance. If there are other subscribers to the stock of the new company, these other subscriptions require formal acceptance. This is accomplished by resolution of the board of directors. The acceptance of these subscriptions completes and makes binding the contract between the corporation and those who have offered to take its stock. Neither party can then recede, and the accepted subscribers at once become stockholders of the corpo-

ration entitled to all the rights of stockholders. The issue of certificates to these subscribers does not usually take place until their subscriptions are fully paid, but this does not affect their rights as stockholders in any way, the certificate being merely a convenient method of evidencing their status. If "accepted" subscribers do not fulfill the conditions of subscription, their stock may be forfeited when statutory authority for such procedure exists, but until such forfeiture takes place their rights are in full existence.[2]

The acceptance of subscriptions is followed by such action in regard to the payment thereof as may be necessary. If part or all of the subscription price of the stock were due on acceptance, the treasurer of the company would be empowered to collect the amounts due. If, as in New Jersey, thirty days' call must be made—unless waived by the subscribers—before any part of the subscription price of stock can be collected, the board should either instruct the treasurer to issue such call, or, as is usually done, secure a waiver of this condition by the subscribers and take immediate steps for the collection of the amounts then due.

If the corporation has been organized with the minimum amount of subscriptions permitted by the statutes and additional subscriptions are necessary or desired, the action taken will be governed entirely by the conditions of the particular corporation. In most cases the proper officers of the corporation would be instructed to offer for sale or subscription such portion of the capital stock as was to be sold.

§ 246. Exchange of Stock for Property

If, as is almost invariably the case with business corporations of the present day, all or a portion of the corporate stock is to be issued in exchange for property, the matter is usually brought before the first meeting of the board by the

[2] 1 Cook on Corp., §§ 52, 72; 2 *Id.*, § 540; but see Bole *et al.* v. Fulton *et al.*, 82 Atl. (Pa.) 947 (1912).

submission of a formal written proposition for the exchange, accompanied by a resolution of the stockholders approving the exchange and instructing the directors to accept the proposition. These matters are presented with proper explanations by the presiding officer, or may with entire propriety come through the secretary. Usually the proposition is ordered received and spread in full upon the minutes of the directors' meeting. If it has already been entered in full in the stockholders' minutes, the entry in the directors' minutes would not be necessary, but preferably the proposition should be reserved to appear in the directors' minutes in connection with the final action taken thereon.

Usually such a proposal calls for little discussion as the matter has already been fully considered. The presentation and formal disposal of the documents in the case is therefore generally followed by a formal resolution of acceptance. This resolution should briefly recite the conditions, specifically accept the proposition, and instruct the officers to take the necessary steps to consummate the transaction. It should also authorize the proper officers to issue the stock consideration and deliver it against the delivery of the duly assigned property for which it pays.

§ 247. Treasurer's Bond; Depositary

In all cases where a bond is required of the treasurer, the details of this bond should be submitted to the board and be formally approved by it before the treasurer assumes the active duties of his office. When the treasurer is agreed upon before this first meeting of the board—as is usually the case—it will be possible and entirely proper for him to have the form of his bond and the name or names of his proposed sureties ready for submission at the first convenient interval in the board proceedings after his election. The form and sureties of the bond, if approved, should be formally accepted,

and the instrument after execution be entrusted to either the president or secretary for safe-keeping. The treasurer will then at once enter on his duties. At times the approval of the treasurer's bond is left to the executive committee or even to the president.

The by-laws should already have provided that the funds of the corporation be deposited in some bank or trust company, or one or more of these institutions as may be necessary and as may be designated by the directors, and that such funds be drawn out only by check signed usually by specified officers of the corporation. It now devolves upon the board to designate the corporate depositary. This is done by means of a resolution, of which a copy is furnished the selected institution at the time of opening the account. This copy should be certified by the secretary, and the names of the officers authorized to sign checks and the form of signature should also be certified to the bank. (See Forms 35, 41.) Often the banks have their own special forms for such resolutions of corporate depositors. In this case, the resolution would conform to the bank's requirements.

§ 248. Other Business

Many matters of lesser importance will be brought before the first meeting of directors, according to the particular conditions. Authority may be needed to rent and furnish suitable offices for the new corporation. In some states provision must be made for a state agent and office. Various statutory requirements must be fulfilled. Certain certificates and reports may need authorization. Details of the general business require consideration. The treasurer should also be authorized and instructed to pay out of the new corporation's funds the expenses of incorporation, including counsel fees and organization taxes.

If the matters requiring attention cannot be all properly

considered at this first session of the board, adjournment should be taken to the next day or to some other convenient date. Such adjourned meeting is considered as merely a part or a continuation of the original meeting, and reassembles at the appointed time without formality and completes its work. If on the other hand the board adjourned without date, it could only be reassembled—prior to the next regular meeting—by the methods prescribed in the by-laws for the calling of special meetings.

Matters requiring the attention of the board are usually so numerous in the first days of the corporate existence that it is a wise precaution—even if not necessitated by business actually on hand—to adjourn the first meeting over a few days. Then, if necessary, the adjourned meeting may be held. If not necessary, the members need not attend and the meeting will lapse, the effect being then exactly the same as if the board had adjourned without date at the first meeting.

BOOK III

CORPORATE MANAGEMENT

Part VIII—Stock Records and Stock Transfer

CHAPTER XXXV

THE STOCK RECORDS

§ 249. Transfer on Books of Corporation

As a rule, the issue of stock is evidenced by the issue of stock certificates, and transfers of stock are effected by assignment of these certificates. The due possession of a properly issued stock certificate, or of such a stock certificate duly assigned, is therefore sufficient evidence of the ownership of stock for all ordinary business purposes.

For all corporate purposes, however, stock certificates are merely secondary evidence of stock ownership, the stock books of the corporation affording the highest evidence of title.[1] In many states this is a matter of statutory regulation; elsewhere, of charter or by-law provision, such statutory or corporate regulations ordinarily prescribing that transfers of stock shall be made only upon the stock books of the corporation and that "stockholders of record," i.e., those whose names appear upon the stock books of the corporation, are alone entitled to exercise the usual rights of stockholders.

Thus it will be seen that while the duly assigned stock certificate is good evidence of the ownership of stock, such ownership is not effective for corporate purposes until the transfer has been recorded upon the stock books of the corpo-

[1] Cleveland, etc., R. R. v. Robbins, 35 O. St. 483 (1880); Brisbane v. Del., etc., R. R., 94 N. Y. 204 (1883).

ration. The holder of such a certificate may force the proper entries upon the corporate books but he cannot exercise the rights of a stockholder until such record has been made; hence the importance of a carefully kept stock book.

Upon the wrongful refusal of the corporation to transfer stock, the owner has three remedies. He may treat the refusal to transfer as a conversion of the shares in the corporation and sue for their value; he may assert his ownership and sue for the dividends; or he may commence an action[2] to compel the transfer upon the books of the company.

A practical application of this rule is found in the usual provision that the transfer books of the corporation shall be closed a specified number of days before elections or dividend days. This absolutely prevents any change of ownership for corporate purposes during the closed period and avoids the confusion that would otherwise exist when preparing for payment of dividends, sending out notices of meetings and determining who is entitled to vote at elections. Stock may be sold without restriction during this closed period, transfers being evidenced by assigned certificates, but the record of these transfers on the corporate books cannot be effected until the stock books are again opened.

If no stock certificates were issued, the interests of the stockholders of a corporation might still be assigned very simply, either by transfer on the books of the corporation by the parties in person in the presence of a corporate official, or by the execution of formal instruments of assignment so attested as to satisfy the corporate transfer officer of their validity.[3]

The books of the corporation used in connection with the issue and transfer of stock are the stock certificate book, the stock ledger, and the stock transfer book.

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[2] Travis v. Knox Terpezone Co., 215 N. Y. 259 (1915).
[3] May v. McQuillan, 129 Mich. 392 (1902); Lipscomb v. Condon, 56 W. Va. 416 (1904).

§ 250. Stock Certificate Book

The stock certificate book consists of blank stock certificates which, numbered and in serial order and each with its corresponding stub, are bound up in book form. The board of directors has power to prescribe the form of stock certificates and to direct their issue. (See Chapter LXVI, "Stock Certificates.")

The stock certificate book is usually prepared at the time the company is organized or sometimes even before, so that certificates may be issued as soon as the corporate officials have been authorized thereto. In this case the form of stock certificate is approved and the issue of certificates authorized at the first meeting of the board. On the other hand, the issue of permanent certificates is sometimes deferred for a considerable period on account of the time required for their preparation, or to temporarily save expense, or for some other reason. Under such circumstances, temporary receipts or certificates (Forms 15, 16, and 17) are issued which are exchangeable for the permanent certificates as soon as the latter are ready for delivery.

When an issue of stock is directed, the secretary fills out and seals in numerical order the proper certificates. At the same time he enters on the stub of each certificate the name of the party to whom it is to be issued, the number of shares represented by the certificate, the date of issue, and, if it is an original issue, that fact is noted on the stub; if a reissue, the number of the certificate surrendered is entered. The stub also usually includes a receipt to be signed by the party to whom the certificate is issued and a blank on which, when the certificate is surrendered for cancellation and reissue, the number of the certificate issued in its stead is entered. The stub when filled out thus contains a complete record of its particular certificate.

When stock is to be transferred, a new certificate should

never be issued until the old certificate, properly indorsed, has been surrendered; except that where a certificate has been lost or destroyed, it should be replaced upon the filing of a proper bond of indemnity and compliance with any other requirements of the by-laws. The surrendered certificate should, as soon as received, be cancelled by cutting, punching, or crossing out the signatures and by writing or stamping across the certificate the word "Cancelled." This is done to prevent the certificate from being reissued or from being used for fraudulent purposes in case it is stolen or otherwise comes into the hands of improper parties. After cancellation the certificate is gummed to the stub from which it was originally taken, the proper entries are made upon the stub (Forms 20 and 21), and, so far as that particular certificate is concerned, the matter is closed. A surrendered certificate should never be reissued or again put in circulation under any circumstances.

In most of the states there are inheritance tax laws, taxing the transfer of property of decedents, including shares of stock; and in Massachusetts, New York, and Pennsylvania, a stamp tax is imposed upon the sale or transfer of all stock. It is the duty of the secretary or other officer of the corporation in charge of the stock certificate book, to see in each instance, before issuing a new certificate, that all requirements of law have been complied with. In the case of the stamp transfer tax, this requires that he see that the proper stamps have been affixed and cancelled. In the case of the inheritance tax, the requirements differ under the statutes of the different states; the most usual provision forbidding the transfer until the inheritance tax has been paid or a waiver obtained from the state official charged with the collection of the tax. The corporation is in all cases made liable to a penalty if the requirements of the law are not complied with.

Every precaution should be taken to avoid mistakes in issuing certificates. The entries on the stub should be made

before the certificate is separated from it. Certificates with space for the name left blank to be filled in later, should never be issued. Such a practice prevents absolutely the accurate recording of the stockholders of the corporation, which is legally essential. A corporation is responsible for any fraud or error committed by its agents in the issuance of stock.[4]

The secretary usually has charge of the stock certificate book and prepares the certificates for issue. Where the secretary receives no regular salary or in cases where there are numerous small transfers of stock, he is sometimes authorized by the by-laws or by resolution of the board of directors to charge a small fee for transfers—usually varying from 10 to 25 cents for each certificate issued. This is occasionally a very convenient regulation, as it compensates the secretary for the time and labor involved in the issue of new certificates and also tends to restrain unnecessary transfers.[5]

In the smaller corporations the stock certificate book is frequently the only "stock book" maintained. This practice is informal and does not keep the record of stockholders in convenient shape for reference, but—in the absence of statutes requiring other stock books to be kept—is not legally objectionable. The stock certificate book then affords the sole record of those who are stockholders and entitled to vote and receive dividends.[6]

§ 251. Stock Ledger and Stock Book

In almost every state in the Union some form of stock record is prescribed by statute, variously termed a "stock book," "stock ledger," "transfer book," or "stock and transfer book." In some states both "stock books" and "transfer books" are required. The intent in all these states is

[4] N. Y. & N. H. R. R. Co. v. Schuyler, 34 N. Y. 30 (1865).
[5] Giesen v. London, etc., Mortgage Co., 102 Fed. Rep. 584 (1900).
[6] Chemical Nat. Bank v. Colwell, 132 N. Y. 250 (1892); *In re* U. S., etc., Co., 74 N. J. L. 315 (1907).

to preserve an accurate record of the stockholders and the stock held by them.

The stock ledger and the stock book are practically, and should be, one and the same book, ordinarily kept under the title "stock ledger" or such other title as may be prescribed by the statutes. This stock ledger must show in alphabetical order the names and addresses of the stockholders of record, the amount of stock held and from whom and when this stock was acquired, and, if any of their stock has been disposed of, to whom and when it was transferred. It must also show the balance of stock at any time to the credit of any stockholder. This balance gives the number of shares upon which such stockholder is entitled to vote and draw dividends. (See Forms 24, 25, and 26.)

In some states additional data must be entered. Thus in New York the amount received by the corporation on any stock acquired by a stockholder must be recorded; in Missouri the amount of capital stock subscribed, the corporate assets and liabilities, and addresses of corporate officers must be included; in North and South Dakota instalments paid and unpaid and any assessments levied and paid or unpaid must be recorded; in Colorado all pledges must be shown by the stock book, and in Vermont the articles of association must appear therein.

The statutes in many states are very peremptory in regard to the keeping of stock books, providing severe penalties for failure. Thus in New York the statutes not only prescribe heavy penalties for failure to keep stock books but provide that no transfer of stock shall be valid as against the corporation, its stockholders, and creditors—save to render the transferee subject to liability as a stockholder—until the record thereof has been duly entered in the stock book.[7]

In most of the states the stock book must be kept open

[7] N. Y. Stock Corp. Law, § 32; Penal Law, § 665.

for inspection of stockholders or creditors of the corporation, and the provisions relating to the stock books apply both to domestic corporations and also to foreign corporations doing business in the particular state. Under a recent statute in New York[8] this right of inspection has been somewhat curtailed, and the right is limited to judgment creditors of the corporation, stockholders who have been stockholders of record for at least six months immediately preceding the demand, and to persons holding or authorized by persons holding stock to an amount equal to 5 per cent of all its outstanding shares. There had undoubtedly been abuse of the right of inspection for improper purposes, or for purposes entirely foreign to the corporation, but the statute in question has received much criticism.

The stock ledger is usually posted from the transfer book and its balances may be checked from time to time by comparison with the number of shares outstanding as shown by the open stubs of the stock certificate book. (See Forms 24, 25, and 26.)

§ 252. Transfer Book

The transfer book contains not only a record of transfers of stock of the particular corporation but also the actual instruments of assignment by which these transfers were effected. It is the book referred to by the usual form of stock certificate in the clause reading "transferable only on the books of the company, etc." (See Form 20.) In some of the states a transfer book is a statutory requirement.

The transfer book is found in two general forms. As usually kept by the smaller corporations (Form 23), it consists of a series of blank transfers or assignments bound in book form. These are filled out and signed by the owner of stock or his duly authorized attorney when the actual transfer

[8] Laws of 1916, Ch. 127.

of stock disposed of by him is made upon the books of the company. They are primarily designed to be formal evidence of the transfer of stock. They are also the secretary's authority for the issuance of new certificates of stock to the assignee in place of the old certificates surrendered.

A different form of transfer book is used by the larger corporations where the number of transfers is too great to permit of the convenient use of the form already described. In this book but one line is required for each transfer of stock, the transferee or his duly authorized attorney signing in the right-hand column.

By reference to the assignment on the back of the stock certificate (Form 22), it will be seen that the assignment of the transfer book is practically a duplication of that on the back of the stock certificate, save that the power of attorney to transfer the stock on the books of the corporation is omitted from the transfer book. As the duly executed assignment on the back of a surrendered stock certificate is a full and sufficient transfer of the actual ownership of the stock and justifies the secretary in issuing another certificate in the name of the assignee, many of the smaller corporations never keep a stock transfer book, relying entirely upon the stock certificate book with its stubs and duly assigned and cancelled certificates for the record and evidence of authorization of transfers.

When the transfer book is used, its assignment forms are signed either by the party making the transfer or by his duly authorized agent. Should the transferrer come in person —as he has the right to do—and sign a transfer on the stock transfer book, there is no legal necessity for his signature to the assignment on the back of the stock certificate. It is, however, always customary for him to execute the assignment on the back of the surrendered stock certificate as well.

It is but seldom that the transferrer makes the transfer on

the books of the corporation in person. In perhaps ninety-nine cases out of a hundred he merely signs in blank the assignment on the back of the certificate and turns it over to the purchaser. The name of the attorney to make the transfer is then inserted at the time the certificate is presented for transfer, either by the party by whom the certificate is surrendered or by the secretary of the company, who as a matter of convenience usually inserts his own name. The attorney so designated signs the transfer on the transfer book.

§ 253. Closing the Books

In all the larger corporations it is customary to close the stock books to transfers prior both to elections of directors and the payment of dividends,[9] for a period of from 2 to 40 days. This is done to enable the corporate officers to make an accurate list of those entitled to receive notice of meetings and to vote thereat or to receive dividends.

In a number of states the statutes expressly authorize the stock books to be so closed to transfers. Where this is not the case, it may be provided for in the charter or by-laws. The precise number of days for which the transfer books are closed is usually fixed by the by-laws. The resolution declaring dividends usually fixes the number of days for which the books shall be closed before the dividend day, if this is not prescribed by the by-laws.

In some cases the statutes or by-laws merely provide that stock shall be voted by the owner of record, as shown by the books of the company, 10, 20, 30, or 40 days before an election. This wording does not justify closing the stock books and refusing to make transfers. In such case transfers are made without interruption, but the secretary, in making up his lists of stockholders for the election, ignores transfers made after the fixed date.

[9] Jones v. Terre Haute, etc., R. R. Co., 57 N. Y. 196 (1874).

No formality attends the closing of the stock books and usually no entry thereof is made upon the books, the secretary merely refusing to transfer certificates presented to him for that purpose during the prescribed period. The notice of the annual meeting or of dividends usually sets forth the days for the closing and reopening of the transfer books.

CHAPTER XXXVI

TRANSFER OF STOCK

§ 254. Procedure of Transfer

When stock is to be transferred, one of the following courses is ordinarily pursued: (1) The certificate is assigned in blank and delivered to the transferee, in which case the assignment is absolute[1] and the certificate may then be passed from hand to hand and the ownership of the stock it represents be thereby transferred any desired number of times without change of or addition to the assignment. (2) The assignment on the back of the certificate is completed by the insertion of the name of the transferee and the delivery of the certificate to the transferee (see Form 22), in which case the certificate must be surrendered and a new certificate taken out by the transferee before it can be again transferred. (3) The assignor completes the assignment form on the back of the certificate, surrenders the certificate to the secretary of the company, and secures and makes delivery of a new certificate in the name of the transferee. (4) The certificate is delivered to the transferee without indorsement, but accompanied by an instrument of assignment or power of attorney having the same effect as the indorsement upon the back of the certificate.

When transfer is made by delivery of the certificate with the name of the transferee inserted in the assignment, the transfer is not made on the books of the corporation until the assigned certificate is surrendered. In the meantime the original owner is still the owner of record and will therefore be

[1] People v. Utah, etc., Mines Co., 135 App. Div. (N. Y.) 418 (1909); Morris v. Hussong, etc., Co., 81 N. J. Eq. 256 (1913).

held should any stockholders' liabilities arise, although as between the immediate parties the transfer is complete, and the transferrer could recover from the transferee any assessment or other moneys which he might be compelled to pay as a stockholder of record. This objection, when the stock transferred is full-paid, is not in most states material in the case of ordinary business corporations; but when stock of banks, trust companies, or other financial corporations is transferred, or when stock is not full-paid, it may be material and even vital.

When transfer is made by assignment in blank, and the blank has been filled so that it is a completed assignment, the transfer on the books of the corporation is not made until the transferee surrenders the assigned certificate.

An objection to the assignment and surrender of the old certificate by the transferrer with issue to him of a new certificate in the name of the transferee is sometimes found in the fact that the proposed sale or other arrangement for the transfer of the stock may fail. The transferrer in such case naturally retains the new certificate but finds himself in the very awkward position of owning stock which stands on the books of the corporation in another's name.

In practice the assignment in blank on account of its convenience, is employed in the great majority of stock transfers.

When the holder of a certificate assigned in blank wishes to perfect his title and make himself a holder of record, he fills in his own name as assignee and surrenders the certificate to the secretary or transfer agent for transfer. He may also, if he sees fit, fill in the name of the party who is to make the transfer upon the books of the corporation, though this is usually left blank. If the signature to the assignment is genuine and there are no reasons for suspecting any irregularity, the transfer is made as a matter of course and a new certificate is issued in the name of the assignee. If the name of

the attorney to make the transfer is left blank in the assignment of the surrendered certificate, the secretary of the corporation usually fills in his own name and then completes the transfer, thereby avoiding the delay that might result if some outside party were designated who must come in and sign the transfer book before the transfer could be duly recorded.

When the assignment on the back of the certificate has been completed by the insertion of the assignee's name, the certificate is not readily negotiable and is almost invariably turned in and a new certificate taken out. If, however, conditions make it necessary for the assignee to transfer the certificate originally assigned to him, he may effect the transfer by means of a second assignment—in blank if desired—written on the back of the certificate, or written on a separate sheet and attached to the certificate.

As already stated, stock assigned by indorsement of the certificate, whether in blank or complete, still stands on the books of the corporation in the original owner's name until the certificate is surrendered and the proper entries are made on the stock books of the corporation. Until this is done the original owner is still the stockholder of record and, while subject to any stockholders' liabilities accruing meanwhile, has, on the other hand, a legal right to vote and to receive payment of any dividends declared even though the actual sale of his stock was consummated months before.[2] His right to vote is absolute, and after its exercise cannot in any way be overturned or questioned. His right to dividends is qualified, as the dividends belong to the actual owner of the stock, i.e., the person possessing the duly assigned stock certificate, to whom the holder of record must account. His responsibility as to any stockholders' liability is, as to the corporation, absolute, but for any such payments he has recourse on his assignee.

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[2] Brisbane v. Delaware, etc., R. R. Co., 94 N. Y. 204 (1883); Cleveland, etc., R. R. Co. v. Robbins, Admr., 35 O. St. 483 (1880).

Before delivering the new certificate, the secretary should, when possible, require the party who presented the old certificate for transfer—who may or may not be the assignee—to sign a receipt therefor on the stub. If the new certificate is delivered by mail, it may be registered, in which case the stub in the stock certificate book, the office copy of the letter accompanying the certificate, and the returned registry receipt, which should be attached to the stub, make a sufficient record of the transaction. Blank receipts are sometimes sent with the certificates in such cases, to be signed by the recipient and returned, and these receipts when received by the secretary are pasted on the proper certificate stubs.

Frequently the owner of stock wishes to sell or transfer only a portion of the stock represented by a certificate, and in such case the assignment on the back of the certificate may be filled out according to the facts. For instance, if Howard Fielding owned 100 shares of stock, all included in a single certificate, and wished to sell 20 shares to James Wilton, he might fill out the assignment as follows: "unto James Wilton twenty shares and Howard Fielding eighty shares," or if the secretary will accept the somewhat informal assignment, it might be merely filled out "unto James Wilton twenty shares," it following as a matter of course that if only 20 shares are assigned, the balance of the stock remains with the assignor.

The owner of the 100 shares then brings or sends in his certificate to the secretary and instructs him to make out two new certificates—one for 20 shares in the name of the new owner, the other for 80 shares in his own name. The secretary makes the proper entries on the stock book, cancels the old certificates, issues the two new certificates in accordance with his instructions, and delivers *both*—unless he has express instructions from the original owner to the contrary—*to this original owner,* who then makes delivery of the 20-share certificate at his convenience. The secretary must be

governed entirely by the instructions of the assignor in delivering new certificates, no matter in whose name these certificates may be issued, as they are still in fact the property of the original owner.

Another and usually preferable method when but a portion of the stock represented by a certificate is to be transferred, is for the original owner to have the new certificates issued to himself. When this is to be done, he fills in his own name as assignee, instructing the secretary to issue new certificates for the proper number of shares. In the case instanced he would have two certificates issued—one for 20 shares and the other for 80 shares—in his own name. He would then assign the 20-share certificate in blank, or in the name of the new owner, and deliver it if the transaction is concluded. The new owner may then bring in and surrender this assigned certificate and take out a new certificate in his own name at his convenience.

When this plan is followed, even should the sale fail after new certificates were issued, the original owner still has the stock standing on the books of the corporation in his own name and both certificates made out to him; whereas if the first plan had been followed, one of the certificates being made out to the proposed purchaser, part of his stock would stand on the books in the transferee's name, and the real owner must either secure the assignment of this other party as a matter of courtesy, or otherwise be put to much trouble to get the certificate back into his own name.

When a certificate is surrendered for reissue in one or more certificates in the original owner's name, the transfer may be entered on the transfer book as a matter of record, but, as the owner's stock account is not affected one way or the other by the transaction, it should not be posted therefrom to the stock book. A memorandum of the facts should be made in the transfer book and on the stubs of the certifi-

cates involved in the reissue, and the certificate numbers in the stock book must be corrected.

When a certificate is lost and by due procedure the owner has secured an order from the board of directors for its reissue, the secretary's best plan is to treat the transaction just as he would if the owner brought in a certificate with a request for a reissue, save that he must of necessity omit the usual formality of the cancellation of the old certificate. The owner should be required to sign the transfer on the transfer book, his name being also entered as the transferee, and the facts of the case should be noted on the transfer book and on the stubs of the old and new certificates. The transfer is not, however, posted from the transfer book to the stock ledger, though the changed certificate numbers should be noted in this latter book.

The secretary or officers of the corporation may refuse a transfer or reissue of stock until the old certificate has been surrendered or until any other proper requirements have been complied with. When, however, this has been done, they must make the desired transfer or reissue.[3] The authenticity of the signature to an assignment of a stock certificate must be satisfactorily established when necessary. In the smaller corporations the secretary is usually familiar with the signatures of the stockholders. The larger corporations sometimes require the signatures to be witnessed or guaranteed by some person known to the transfer agent or otherwise that they shall be formally acknowledged before a notary public. If there is any doubt as to the authenticity or correctness of the assignment or as to the title of the party presenting the certificate, or as to any other material matter, the secretary has the right to delay the transfer for a reasonable time in order to communicate with the former holder or take such other steps as he

[3] Jones v. Terre Haute, etc., R. R. Co., 57 N. Y. 196 (1874); Robinson v. National Bank of New Berne, 95 N. Y. 637 (1884).

may deem expedient. If after due investigation there still remains doubt as to the propriety of the transfer or the ownership of the certificate, or if there be conflicting claims, the secretary may properly decline to act until instructed by the board of directors, and the board, if in doubt, may decline to take action in the matter until ordered thereto by some court of competent jurisdiction.

§ 255. Transfer of Treasury Stock

When treasury stock is donated to, or otherwise acquired, by a corporation (see Chapter XI, "Treasury Stock"), the assignment may run to the corporation direct, as "John Marshall Company"; to its treasurer, as "Treasurer of John Marshall Company"; or to a trustee, as "John H. McGowan, Trustee for John Marshall Company." The certificates so assigned are cancelled when received and the proper entries are made on the transfer book and stock ledger. When such stock is held in the name of the company or even by the treasurer of the company, no new certificates need be issued until the stock is sold, the fact that certificates are not issued being noted on the stock books. When a sale of such stock is made, the new certificates are made out direct to the purchaser. Certificates might properly be issued meanwhile in the name of the company or to the treasurer if desired, but such issue is unnecessary as the data of the transfer book, the entry on the stock ledger, and the cancelled certificates are quite sufficient to evidence the transaction. It is obvious that the reasons that make the certificate desirable when stock is held by an individual, do not apply when a corporation holds its own stock.

When treasury stock is sold, the secretary is authorized by due resolution of the board of directors to issue the proper certificates. Such transfers are entered on the stock books of the corporation as in case of any other transfer of stock.

If certificates are not issued for the stock while held by the corporation, this fact should be noted on the stock books. It is not necessary to issue certificates until the stock is sold.

§ 256. Transfer Agent and Registrar

A transfer agent in the modern acceptation of the term, is one who supervises and certifies transfers of corporate stock. The extent of his supervision depends upon custom or upon the particular agreement.

A transfer agent usually keeps the stock certificate book in his custody. When a transfer is to be made, the certificate of stock duly assigned is surrendered to the transfer agent, who thereupon cancels the surrendered certificate, attaches it to its proper stub, and issues a new certificate in the name of the transferee. This certificate is then sent to the proper corporate officials who affix their signatures and the corporate seal—unless the seal is also entrusted to the transfer agent—make the proper records in the transfer and stock books, and return the signed, or signed and sealed certificate to the transfer agent. The transfer agent thereupon seals the certificate if not already sealed, indorses it in evidence of its due issue, delivers it to the transferee, and the transaction is closed.

Occasionally when a transfer agent is employed, the stock certificate book is retained in the custody of the corporation. In such case when a certificate is presented for transfer, it is cancelled by the transfer agent and turned over to the corporation in exchange for a new certificate issued in the name of the transferee. This certificate is indorsed by the transfer agent and delivered to its owner. When the stock certificate book is kept by the corporation, the transfer agent keeps an independent record of stock certificates issued and surrendered, in order that the regularity of any particular transfer or issue may be readily and definitely ascertained.

A registrar is a corporate appointee who also supervises

the transfer of corporate stock but does not usually carry his supervision to the same extent as does the transfer agent, his function being merely to register stock as issued. He maintains a record of all stock certificates issued and of the surrender and reissue of any new certificates with the names of the parties to the transfer. If an issue or transfer is to be made, the registrar passes upon the certificates and countersigns them if they are correctly issued. His signature is evidence of due issuance.

It will be seen that the duties of the transfer agent and registrar are distinct, and should not be performed by a single person or institution. The function of the transfer agent is to insure the proper issue of stock. The function of the registrar is to insure the regularity of issue and to prevent overissues. The functions of the two somewhat overlap, as the transfer agent would not permit an overissue of stock nor would the registrar sign stock improperly issued.

It is obvious that the work of a transfer agent and registrar to be effective must be discharged by persons or institutions of the highest character and unquestioned standing. For this reason trust companies are usually appointed.

Speaking generally, the employment of transfer agents and registrars is advisable whenever transfers of stock are likely to be numerous. The procedure involved is simple in theory but in practice involves much detailed work. Also it is usually desirable that transfers be effected rapidly and accurately. The employment of the proper transfer agent and registrar, or transfer agent alone, relieves the corporate officials from the detailed work and responsibility involved, reduces the possibility of fraud or error in the issuance of stock to a minimum, and affords a general safety and convenience not otherwise secured. Stock exchanges require that the securities listed by them shall be issued through suitable transfer agents and registrars.

§ 257. Lost and Stolen Certificates

A stockholder so shown by the books of his company, is entitled to every right and privilege of a stockholder without regard to the whereabouts of his certificate.[4]

When certificates are lost, the owner usually desires to have new certificates issued, not in order to secure any corporate rights but merely to have his interest in such shape that he may readily sell, pledge, or otherwise use his stock. Stockholders have a general right to certificates[5] and, if their certificates are lost, to have them replaced, but, before it reissues any such certificates, the corporation on its part has the right to require reasonable safeguards for its own protection.[6] The by-laws should outline the proper procedure, which must conform to any statutory requirements. (See Form 7.)

A bond of indemnity is usually and properly required before a lost certificate is replaced, as it is always possible that the missing certificate may turn up in the hands of an innocent purchaser for value, who might have cause for damages against the corporation if it refused to recognize his rights. It is but seldom wise to reissue lost certificates unless such bond is given. Only the absolute and irrecoverable loss of a certificate, as in case of its unquestioned destruction by fire, would justify an unprotected reissue.

When the value of missing certificates is considerable and the circumstances are doubtful, it is sometimes best for the directors to refuse absolutely to replace the certificates until the owner secures an order from some court of competent jurisdiction. When this is done the directors are relieved from all responsibility in the matter. The officers of the com-

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[4] National Bank v. Watsontown Bank, 105 U. S. 217, 222 (1881); Birmingham National Bank v. Roden, 97 Ala. 404 (1892); Wheeler v. Millar, 90 N. Y. 353 (1882).

[5] Buffalo, etc., R. R. v. Dudley, 14 N. Y. 336 (347) (1856); Fletcher v. McGill, 110 Ind. 395 (1886).

[6] Guilford v. W. U. Tel. Co., 43 Minn. 434 (1890); Butler v. Glen Cove Starch Mfg. Co., 18 Hun 47 (1879).

pany should never take the responsibility of reissuing a lost or stolen certificate of stock without express authorization from the board of directors. Should they do so and the missing certificate turn up in such a way that loss is involved, they would be responsible to the corporation.

In case certificates are lost or stolen, the secretary of the company or its transfer agent should be immediately notified, and such other steps be taken as may be necessary to prevent the negotiation of the missing certificates. When lost certificates are indorsed in blank and are presented to the transfer officers of the corporation before these officials have been notified of the loss, they may make the transfer, and the corporation will not be liable to the owner if the circumstances were such as to justify the belief that such transfer was regular and in good faith. If, however, the proper officials have been warned of the loss, or the circumstances were such as to put them on notice, they could not safely make such transfer.

In states where the common law prevails, a stock certificate is not perfectly negotiable as are notes, drafts, and other forms of negotiable paper, but is quasi-negotiable, and usually an innocent purchaser for value of a properly indorsed certificate is protected.[7] "Excepting in cases of certificates transferred in blank and lost or stolen without negligence on the part of the owner, a *bona fide* purchaser is protected now in almost every instance where he would be protected if he were purchasing a promissory note or other negotiable instrument."[8]

Thus a party finding or stealing certificates of stock even though these certificates are indorsed in blank, takes no title nor does any one who buys the lost or stolen certificates from him, the title remaining in the original owner.[9] If, however,

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[7] Knox v. Eden Musee Co., 148 N. Y. 441 (1896); Trust & Sav. Co. v. Home Lumber Co., 118 Mo. 447 (1893).

[8] 2 Cook on Corp. § 416; Real Estate Trust Co. v. Bird, 90 Md. 229 (1899); Jarvis v. Manhattan Beach Co., 148 N. Y. 652 (1896).

[9] O'Herron v. Gray, 168 Mass. 573 (1897); Hannahs v. Hammond Typewriter Co., 158 App. Div. (N. Y.) 620 (1913); Barstow v. City Trust Co., 216 Mass. 330 (1914).

a lost or stolen certificate is surrendered to the corporation and a new certificate received in its place—as might readily be the case if the corporate officials were not promptly notified of the loss—any purchaser in good faith of this new certificate takes a clear title. The original owner has then lost all rights in the matter save that of bringing suit against those through whose hands the certificate passed before its reissue by the corporation.

In case of any doubt or any dispute as to ownership of a certificate, no transfer should be made by the corporation until the true ownership has been definitely determined.

In order to secure the greatest possible security to purchasers of stock, and to facilitate the free transfer of shares, an act known as the "Uniform Transfer Act" has been adopted with only slight variations in form in New York, Pennsylvania, Massachusetts, New Jersey, and a number of other states. By this act certificates of stock are made negotiable instruments subject to the rules of the law governing commercial paper. The step is really not a radical one, for, as has been shown, the courts have gone far in cases under the common law to protect bona fide purchasers. The statutes, of course, are not extra-territorial in their scope, and by provisions in the acts themselves apply only to certificates issued after their passage.

§ 258. Pledges of Stock

The quasi-negotiability of stock, and in many states its full negotiability, renders its use as a pledge or collateral security a very simple matter, effected by the mere indorsement and delivery of the certificate.[10] The usual procedure is for the pledgor to give his note for the amount secured, the note reciting the pledge of stock and the terms under which it is

[10] Christian v. Atlantic & N. C. R. R., 133 U. S. 233 (1890); Seymour v. Hendee, 54 Fed. Rep. 563 (1893); Atkinson *et al.* v. Foster, 134 Ill. 472 (1890).

held. These terms usually empower the pledgee to sell the collateral without notice to the pledgor. The delivery of the stock as security is, however, the essential feature constituting the pledge without any written contract,[11] which is necessary only as a record and proof of the transaction.

The pledgee may or may not, at his option, have the pledged stock transferred on the books of the corporation to his own name.[12] If transferred, the word "pledgee" should follow the name of the owner on the new certificates of stock or otherwise the phrase "as collateral security" should appear on the certificates so as to characterize definitely the nature of the pledgee's holding. A memorandum of the facts should also appear in the stock ledger against the entry in both pledgee's and pledgor's accounts.[13] Such entries, if showing clearly the nature of the transaction, relieve the pledgee of any corporate liabilities involved in the absolute ownership of the stock.[14] In some states the pledgee is expressly relieved from these liabilities by statute.[15] When stock is transferred on the books of the company to the pledgee, the voting right, as a general rule and in the absence of any agreement to the contrary, follows the stock.[16] In some states, however, as in New York, the owner of the stock may demand and receive a proxy from the pledgee upon paying any necessary expenses. In other states, as New Jersey, if it appears on the transfer books that such stock has been transferred only as a pledge, the owner retains the right to vote thereon. Statutes protecting the voting rights of pledgors are found in many states.

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[11] Masury v. Arkansas National Bank, 93 Fed. Rep. 603, 607 (1899); Spreckels v. Nevada Bank, 113 Cal. 272 (1896); Brick v. Brick, 98 U. S. 514 (1878).

[12] Day v. Holmes, 103 Mass. 306 (1869); Fitchburg Savings Bank v. Torrey, 134 Mass. 239 (1883); Anderson v. Philadelphia Warehouse Co., 111 U. S. 479 (1884).

[13] 2 Cook on Corp., § 466.

[14] Pauly v. State Loan & Trust Co., 165 U. S. 606 (1897); Tourtelot v. Stolteben, 101 Fed. Rep. 362 (1900).

[15] Barre National Bank v. Hingham Manuf. Co., 127 Mass. 563 (1879); Burgess v. Seligman, 107 U. S. 20 (1882).

[16] Commonwealth v. Dalzell, 152 Pa. St. 217 (1893); *Re* Argus Printing Co., 1 N. Dakota 434 (1891); s. c., 12 L. R. A. 781, and note.

When stock is pledged, the pledgee is entitled to receive any dividends declared meanwhile, and, if the stock has been transferred to the pledgee, or if the company has been properly notified that the stock is held in pledge, they must be paid to him.[17] In the absence of notice or transfer, as the pledgor remains the owner of record of the pledged stock, dividends are properly paid to him, and the pledgor and pledgee must then settle the ownership of the dividends between themselves. On the termination of the pledge, the pledgee must account for any dividends received by him.

Upon default in payment of the amount it secures, the pledgee has the right to sell pledged stock. If the note or other memorandum of the pledge contains no agreement or provision for such sale, the pledgee must give the pledgor due notice of his intention to sell the stock and thereupon may sell the stock at public sale and apply the proceeds to the payment of his debt. Notice must be given the pledgor a reasonable time before the sale and such notice must specify the time and place of sale, both of which must also be reasonable. Two days' notice has on occasion been held sufficient,[18] and four days' notice when the parties lived in different towns.[19]

When notice of time and place is waived by express terms of the pledgor's agreement, as is usually the case, the pledgee may sell at any time after default. The sale must be by public auction, unless otherwise agreed, must be in good faith, and an endeavor must be made to obtain a fair price. The pledgee himself may not bid the stock in, either directly or indirectly. If he does, the pledgor may have the sale set aside. In many of the states the whole matter of the pledge of stock and its sale is regulated by statute.

At any time before sale the pledgor may pay the debt and

[17] Fairbanks v. Merchants National Bank, 132 Ill. 120 (1889); Guarantee Co. v. East Rome Co., 96 Ga. 511 (1895); Nat. Bank v. Equitable Trust Co., 227 Fed. 526 (1915).

[18] Edwards on Bailments, § 285.

[19] Guinzburg v. Downs Co., 165 Mass. 467 (1896).

all interest and any reasonable expense involved in the preliminaries of the sale and claim his stock. This stock need not be the particular shares pledged but merely an equal amount of the same stock.

§ 259. Restrictions on Transfers

Every stockholder whose stock is paid for in full is entitled to transfer his stock freely. Even where the stockholders have entered into a contract to restrain the alienation of stock or have enacted by-laws for the same purpose, the courts have usually set the restraining provisions aside as being contrary to public policy.[20] Charter provisions restricting the transfer of stocks have, however, been held valid.[21]

In some states the statutes prescribe specifically that stock subscribed but not fully paid for in accordance with the subscription agreement is not transferable save with the consent of the corporation. Elsewhere charter or by-law provisions may give the corporation the right to refuse to register transfers of unpaid stock.[22] In the absence of such provision, the right of transfer is absolute and may be enforced against the corporation.[23].

At times the restriction of stock transfers becomes desirable and various plans have been attempted to effect this end. The courts, however, defend this right so strictly that its legal waiver is difficult. Perhaps the most successful method, when all the parties are in agreement, as to the advisability of such restraint is to form a voting trust for a certain number of years. All the stock—or all the stock entering into the agreement—is placed in the hands of voting trustees appointed un-

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[20] Johnson v. Laflin, 103 U. S. 800, 803 (1880); Quiner v. Marblehead, etc., Co., 10 Mass., 476 (1813); Morris v. Hussong Dyeing Machine Co., 81 N. J. Eq. 256 (1913); Steele v. Farmers', etc., Telephone Assn., 148 Pac. (Kan.) 661 (1915); Kretzer v. Cole Bros., etc., Co., 181 S. W. (Mo.) 1066 (1916).

[21] Longyear v. Hardman, 219 Mass. 405 (1914).

[22] Barrett v. King, 181 Mass. 476 (1902).

[23] Craig v. Hespeira L. & W. Co., 113 Cal. 7 (1896); Kinnan v. Sullivan County Club, 26 App. Div. 213 (1898).

der the terms of the voting trust agreement and is held by them, withdrawn from sale, for the period of the trust. Such arrangements are effectual and are upheld by the courts in most states if they do not extend for an unreasonable period.[24] (See Chapter LII, "Voting Trusts.") In some states they are expressly permitted by the statutes under restrictions as to the term of their duration.

§ 260. Lien of Corporation

At common law a corporation has no lien upon its shares for debts due to it from its stockholders. The authority for any lien which the corporation may have must, therefore, be found in the statutes, its charter, or its by-laws.[25] Where the lien is given by statute or charter, the lien is enforcible against the stock into whosoever hands it may come irrespective of whether the assignee has any actual knowledge of the statute or charter provision.[26] Where an attempt has been made to create a lien by provision in the by-laws, it has generally been held that the stock is not bound in the hands of an assignee who took without notice,[27] actual or constructive, of the lien provision.

In New York, Massachusetts, Pennsylvania, New Jersey, and other states which have adopted the law regulating the transfer of stock, known as the "Uniform Stock Transfer Act," there can be no lien or restriction upon the transfer of shares by virtue of a by-law or otherwise, unless the right of the corporation to such lien or restriction is stated on the certificate.

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[24] Brown v. Britton, 41 App. Div. 57 (1899); Williams v. Montgomery, 148 N. Y. 519 (1896); Hey v. Dolphin, 92 Hun (N. Y.) 230 (1895).

[25] 2 Cook on Corp., § 522; Driscoll v. West B. & C. M. Co., 59 N. Y. 96 (1874).

[26] Curtice v. Bank, 110 Fed. 830 (1901); United, etc., Co., v. Winston, etc., Co., 194 Fed. 947 (1912).

[27] Driscoll v. West B. & C. M. Co., 59 N. Y. 96 (1874); Bankers' Trust Co. v. McCloy, 159 S. W. (Ark.) 205 (1913).

CHAPTER XXXVII

RULES REGULATING TRANSFERS

§ 261. Responsibility of Corporation as to Transfers

It is the duty of the corporation to record all lawful transfers; and if it refuses, the record may be compelled by recourse to the courts,[1] or the corporation may be held liable in damages.[2] If there is doubt as to the identity of the transferee or the authenticity of the transferrer's signature, the corporation may require proper proof thereof, and in cases where two parties claim the ownership of stock or where the corporation has been notified not to register a transfer, the corporation may, if there is any real uncertainty or reason therefor, decline to make any record on the corporate books until the matter has been settled by the courts.[3]

The corporation is responsible if its officials record a forged transfer.[4] It is the duty of the corporate officials to know the stockholders' signatures or otherwise to secure evidence of their authenticity before making a transfer. For this purpose, they may require the personal attendance of the transferrer or clear proof that his signature is genuine.

In case stock certificates indorsed in blank are lost or stolen, the corporation is not liable for receiving the certificates and transferring the stock represented thereby, if the

[1] Real Estate Trust Co. v. Bird, 90 Md. 229 (1899); Rice v. Rockefeller *et al.* 134 N. Y. 174 (1892).

[2] Hine v. Commercial Bank of Bay City, 119 Mich. 448 (1899); Ralston v. Bank of California, 112 Cal. 208 (1896); Commercial Bank, etc. v. Kortright, 22 Wend. (N. Y.) 348 (1839).

[3] Tel. Co. v. Davenport, 97 U. S. 369 (1878); Athol Savings Bank v. Bennett, 203 Mass. 480 (1909); Amparo Mining Co. v. Fidelity Trust Co., 75 N. J. Eq. 555, 559, (1909).

[4] Cushman v. Thayer, etc., Co., 76 N. Y. 365 (1879); Chicago Edison Co. v. Fay, 164 Ill. 323 (1896).

circumstances are not suspicious and the transfer is made before notice of the theft or loss is received by the corporation.[5]

§ 262. Duties of Officers as to Transfers

"The officers of the company are the custodians of its stock-books, and it is their duty to see that all transfers of shares are properly made, either by the stockholders themselves or persons having authority from them. If, upon the presentation of a certificate for transfer, they are at all doubtful of the identity of the party offering it with its owner, or if not satisfied of the genuineness of a power of attorney produced, they can require the identity of the party in the one case, and the genuineness of the documents in the other, to be satisfactorily established before allowing the transfer to be made. In either case they must act upon their own responsibility."[6] The record of any proper transfer, if refused, may be compelled by either transferrer or transferee.

§ 263. Who May Transfer Stock

Any person of full age who has not been adjudged incompetent, may transfer stock standing in his own name. All who are duly authorized to represent others, as attorneys, trustees, guardians, executors, and administrators, may transfer stock belonging to these others upon giving satisfactory evidence of their authority so to do. Stock belonging to minors and others incompetent to contract may be transferred only by their legally appointed and authorized representatives.

The holder of unpaid stock, i.e., stock upon which the subscription or purchase price has not been fully paid, may as a rule transfer his stock without restriction, but in some states by statute provision such transfer is prohibited or may be made only by consent of the corporation.

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[5] Mandelbaum v. North American Mining Co., 4 Mich. 464 (1857); Dewing v. Perdicaries, 96 U. S. 193 (1877).

[6] Tel. Co. v. Davenport, 97 U. S. 369 (1878).

§ 264. To Whom Stock May be Transferred

There are but few restrictions as to the transferees of stock. A corporation may, if its officials see fit, refuse to transfer stock to anyone not competent to assume the obligations of a stockholder, such as a minor or a person of unsound mind. Also a corporation when in a failing condition may refuse to transfer stock to an irresponsible transferee.[7] Beyond these few exceptions, stock may be transferred freely and in the absence of fraud the transfer is valid and must be recorded by the corporation.

§ 265. Liability Involved in Transfers

The liability of unpaid stock obtains in every state of the Union. Full-paid stock, on the other hand, involves no liability to the corporation or its creditors whatsoever, save in the case of financial institutions—on the stock of which a further liability is usually imposed—and in those states in which by express statutory provision liabilities are imposed or assessments are permitted on stock even though full-paid.

When liabilities do or may exist on full-paid stock, and transfers of such stock are made between parties competent to contract, any liabilities accruing before the transfer remain with the transferrer, but any liabilities accruing thereafter pass to the transferee.

The liabilities of unpaid stock are affected by statute provisions in a number of states, but otherwise are subject to the general rules that the transferrer is liable for any calls or assessments already made and which are still unpaid,[8] but the transferee is liable for the amount that has not yet been called.

An exception to this general rule obtains when a transfer has been made but has not been recorded on the books of the

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[7] 2 Cook on Corps., § 395.

[8] May v. McQuillan, 129 Mich. 392 (1902); Sigua Iron Co. v. Brown, 171 N. Y. 488 (1902); Webster v. Upton, Assignee, 91 U. S. 65 (1875); Pullman v. Upton, 96 U. S. 328 (1877).

corporation. In such case the transferrer is still the owner of record and is therefore still liable for any amounts unpaid on his transferred stock and, if calls are made before the transfer is recorded, must pay them. He may collect these payments, if he can, from the transferee.

Another exception to the general rule is found when the corporation has wrongfully issued stock certificates marked "Full-paid," in which case any bona fide purchaser of such certificates without knowledge of the true character of the stock takes it free from liability to the corporation and to corporate creditors in case the corporation becomes insolvent.[9] This is also true when a purchaser in good faith takes over stock under such circumstances as to lead him to believe it is full-paid. In any such case, as far as the transferee is concerned, the stock is held to be full paid and the corporation or its creditors cannot hold him liable.

In the following cases the rule as to the liabilities involved in transfers of stock is as set forth.

A married woman may take stock in her own name, in practically every state of the Union, and take therewith every right and responsibility of ownership.[10]

A minor may receive a transfer of stock and the corporation may record it if the corporate officials see fit, but, as the minor may at will repudiate the whole transaction, the transferrer remains liable.[11] The same rule holds as to a transfer to a person known to be insolvent, the transferrer not being relieved from liability.[12]

A transfer to an agent, attorney, trustee, guardian, administrator, or executor in his own name, followed by a statement of the capacity in which he acts, as "James H. McLane,

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[9] Rochester, etc., Co. v. Roe, 7 App. Div. (N. Y.) 366 (1896); Sprague v. National Bank, 172 Ill. 149 (1898); 42 L. R. A. 606.

[10] Cook on Corp., §§ 250, 396.

[11] Foster v. Chase, 75 Fed. Rep. 797 (1896); Foster v. Wilson, 75 Fed. Rep. 797 (1896).

[12] Bowden v. Johnson, 107 U. S. 251 (1882); Rochester, etc., Co. v. Raymond, 158 N. Y. 576 (1899).

Agent," renders him personally liable on the stock so held,[13] except where expressly exempted by statute.[14] The same is true where a transfer is made to the treasurer of a corporation in his own name, as "Henry James, Treasurer."[15]

A transfer to two persons, as "George Howard and John Mackel," makes them tenants in common and each may be held for one-half of any liability on such stock and both must join in a transfer.[16] A transfer to a firm, however, as "Howard & Mackel," does not have this effect but creates a partnership holding and a partnership liability.[17]

A transfer to an existing corporation authorized to hold stock, as "The Strathmore Scale Company," renders the assignee corporation liable as is an individual on the stock transferred. A transfer to a membership corporation or unorganized association, as "Grace Methodist Church" or the "Brooklyn Decorators' Union," is of doubtful legality, and, if the matter of liability is of importance, should not be recorded by the corporation until the right of the body to hold stock has been proved. If not authorized to hold stock, it cannot assume the liabilities of a stockholder.

A transfer to a dummy stockholder, as in case of transfer to any other agent, renders the dummy liable if he has property sufficient to make the liability effective.[18] The party for whom the dummy is acting is, however, likewise liable as an undisclosed principal.[19] A transfer to a pledgee in his own name without qualification renders him liable. It is otherwise, however, if the nature of the transfer is shown by its form, as "Howard Fielding, Pledgee."[20]

[13] Wadsworth v. Laurie, 164 Ill. 42 (1896); Winston v. Dorset Pipe, etc., Co., 129 Ill. 64 (1889).
[14] Davis v. Essex Baptist Society, 44 Conn. 582 (1877); Lucas v. Coe, 86 Fed. Rep. 972 (1898).
[15] 2 Cook on Corp., § 724, and notes.
[16] Markell v. Ray, 75 Minn. 138 (1898).
[17] Barton National Bank *et al.* v. Atkins *et al.*, 72 Vt. 33 (1899).
[18] Dunn v. Howe, 107 Fed. Rep. 849 (1901).
[19] Pauly v. State, etc., Co., 165 U. S. 606 (1897); Davis v. Stevens, 7 Fed. Cas. 177 (1879).
[20] Robinson v. Southern National Bank, 180 U. S. 295 (1901); Pauly v. State Loan & Trust Co., 165 U. S. 606 (1897).

§ 266. Form of Transfer

A general form of assignment for stock is always printed or engraved upon the back of each stock certificate. (See Form 22.) If there were any reason therefor, stock might with equal effect be transferred by means of a separate assignment written or printed and attached to its certificate. In such case the certificate should be more fully described and identified than is the case in the usual form of assignment.

The signature to the assignment of a stock certificate must correspond exactly with the name on the face of the certificate and should be witnessed. If the signature of the transferrer is entirely unknown to the transfer officer or agent, it should be guaranteed by some responsible party or be acknowledged before a notary public.

If the party signing a transfer of stock acts in a representative capacity, a description of the capacity in which he signs should be added to the signature, as "Howard Fielding, Trustee for Jane Hathaway." If a certificate, issued in her maiden name, is to be transferred by a married woman, the signature should be in the following form: "(Mrs.) Alice H. Walker, formerly Alice H. Ainsley." Occasionally a married woman holding stock in her maiden name wishes it transferred to the name acquired by marriage. In such case the signature to the assignment is similar to that just given and the blank for the name of the transferee is filled in as follows: "(Mrs.) Alice H. Walker."

The name of the transferee should be written in the proper blank of the assignment form without abbreviation, complimentary title, or suffix, though where the transferee is a woman, the designation "(Miss)" or "(Mrs.)," as the case may be, is frequently and properly placed before the name.

When a transfer of stock is to be received by an agent, it should be made out in the name of his principal, unless the agent is willing to assume any statutory liability on the stock

transferred. When stock is transferred by an agent or one acting for another, the name of the principal should be appended to the assignment followed by the agent's name and a statement of the capacity in which he signs; thus, "Frank H. McClelland by Howard James, Attorney."

§ 267. Transfers to and by Agents

Any person competent to contract and wishing to transfer stock, may transfer stock or receive the transfer of stock through an agent. In case of transfer, the agent or attorney in fact should present the certificate to be transferred, accompanied by his power of attorney or a duly acknowledged copy thereof, which should be left on file with the transfer agent or officer of the corporation. Express authority to transfer stock should be given by the power of attorney and, if necessary, evidence should be furnished that the signature to the power is genuine, that the instrument is still in force, and that the party presenting it is the party named therein.[21]

In case of transfer by an agent, it is the duty of the corporation to require satisfactory evidence of the agent's authority. Otherwise in case of a fraudulent transfer the corporation is liable.[22] The corporation is also liable if, with knowledge of the facts, it recognizes a power of attorney executed by a minor, an insane person, or anyone else unable to contract.[23]

In case of transfers of stock to an agent, the certificates, as stated, should be issued in the principal's name, the agent merely receiving the certificates and receipting therefor for account of his principal.

If a certificate is indorsed in blank and entrusted to an agent and the agent assigns the stock fraudulently, the stock-

[21] Tel. Co. v. Davenport, 97 U. S. 369 (1878); Bayard v. Farmers', etc., Bank, 52 Pa. St. 232 (1866).

[22] Tafft v. Presidio, etc., R. R. Co., 84 Cal. 131 (1890); Tel. Co. v. Davenport, 97 U. S. 369 (1878).

[23] Chew & Goldsborough v. Bank of Baltimore, 14 Md. 299 (1859).

holder has no recourse save against the agent, as his own act made it possible for his agent to perpetrate the fraud.[24] The rule is different, however, if the agent transfers the stock directly into his own name. In such case, if the corporation knew of the agency, it is liable,[25] and the original owner will not be estopped from reclaiming the stock.

§ 268. Transfers to and by Executors and Administrators

A corporation cannot refuse to record transfers of stock belonging to an estate, made by the executor or administrator of such estate, provided the proper letters testamentary or letters of administration are presented for inspection.[26] A corporation may also properly require that a certified copy of the will, if any, be exhibited, for the reason that it has been repeatedly held that corporations are chargeable with notice of the contents of the will.[27] Such executor or administrator may transfer the stock directly from the deceased party to a purchaser, or may transfer the stock to his own name as administrator or executor,[28] or may pledge the stock if this be necessary. The corporation should not, however, permit him to transfer the stock to his individual name.[29] When there are two or more executors of an estate, one alone may not transfer stock; all must join.[30]

Before a transfer of stock by an executor or administrator is allowed, a certified copy of the appointment of the party acting should be filed with the corporation. Or in case there is a will, a certified copy of this instrument should be presented for inspection.

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[24] P. R. R. Co.'s Appeal, 86 Pa. St. 80 (1878); Elliott v. Miller & Co., 158 Fed. 868 (1908).
[25] Tafft v. Presidio, etc., R. R. Co., 84 Cal. 131 (1890).
[26] Bayard v. Farmers' etc., Bank, 52 Pa. St. 232 (1866).
[27] Wooten v. Railroad, 128 N. C. 119 (1901); Marbury, Trustee v. Ehlen, 72 Md. 206 (1890).
[28] London, Paris & Am. Bank v. Aronstein, 117 Fed. Rep. 601 (1902).
[29] 1 Cook on Corp., § 329; London, Paris & Am. Bank v. Aronstein, 117 Fed. Rep. 601 (1902); Chester Co., etc., Co. v. Securities Co., 165 App. Div. (N. Y.) 329 (1914).
[30] Bohlen's Estate, 75 Pa. St. 304 (1874); Tunis v. Pass. R. R. Co., 149 Pa. St. 70 (1892); 10 Cyc., p. 594.

Corporate officials recording transfers of executors or administrators with knowledge that a fraud or breach of official duty is involved therein, are liable to the estate. An administrator or executor cannot compel the transfer of stock belonging to the estate when the corporation is domiciled in another state. A purchaser of stock from such an administrator or executor can, however, compel the corporation to recognize his right of property in the purchased stock and to issue to him new certificates.

When a trust discharged by an executor or administrator continues for a long period, the executor or administrator becomes in fact a trustee and his transfers then become subject to the rules governing trustees.[31] The corporation must then refuse the transfer of stock unless the executor or administrator brings satisfactory evidence of his right to make such transfer.

§ 269. Transfers to and by Trustees

The corporate officials must refuse the transfers of a trustee unless his authority is clearly established. His appointment must be in writing and expressly authorize the sale or transfer of stock. If such instrument exists in due form, the trustee may compel transfers by the corporation when the certificates of stock are duly assigned by him in his representative capacity.[32]

The corporation is responsible if it permits any transfer by a trustee not authorized by the trust instrument.[33] If there is more than one trustee, all must sign the transfer,[34] which should be accompanied by a properly certified copy of the instrument of trust establishing clearly the authority of the

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[31] Peck v. Bank, 16 R. I. 710 (1890); 2 Cook on Corp., § 398.
[32] Bird v. Chicago, etc., R. R., 137 Mass. 428 (1884).
[33] Marbury, Trustee, v. Ehlen *et al.*, 72 Md. 206 (1890); Geyser-Marion Gold-Min. Co. v. Stark, 106 Fed. Rep. 558 (1901).
[34] Bohlen's Estate, 75 Pa. St. 304, 312 (1874); Oliver v. Governor & Co., 86 L. T. Rep. 248 (1902).

trustees to make such transfer. Trustees appointed by court should show a copy of the court appointment.

Before stock is purchased from a trustee—provided the certificates of stock indicate that he is a trustee—the purchaser should ascertain whether the trustee is authorized to make the sale.[35] "A certificate for shares of stock running to 'A. B., Trustee,' or to 'A. B. in trust,' without disclosing the names of the beneficiaries or the particulars of the trust, is notice to a purchaser of shares that 'A. B.' does not hold them in his own right, but as a trustee."[36]

When transfers are made to a trustee, his representative capacity should be clearly indicated by reference in the certificate to the will or other instrument under which the trusteeship was created,[37] and the name of the beneficiary should be mentioned when possible; thus, "John Hayden, Trustee for Howard Waller under the will of Horace Waller."

§ 270. Transfers to and by Minors

A corporation may refuse to transfer stock to a minor as he is incapable of assuming the obligations of a stockholder.[38] In case such a transfer is made, the liability of the transferrer as a stockholder of the corporation continues until the minor becomes of age and ratifies the transfer.[39] Minors may receive and hold stock in their own names but cannot transfer stock so held. Assignments should therefore be made to their guardians in the following form: "Alfred Carr (minor) under guardianship of Henry B. Boerum."

A minor is himself unable to make a legal transfer of stock even though the stock is held in his name, and the corporation renders itself liable for any resulting damages if

[35] First National Bank v. National Broadway Bank, 156 N. Y. 459 (1898); Shaw v. Spencer *et al.*, 100 Mass. 382 (1868).
[36] Gerard v. McCormick, 130 N. Y. 261 (1891).
[37] Geyser-Marion Gold-Min. Co. v. Stark, 106 Fed. Rep. 558 (1901).
[38] 2 Cook on Corp., § 396.
[39] Foster v. Wilson *et al.*, 75 Fed. Rep. 797 (1896).

it records such transfer. The only legal method of transferring a minor's stock is therefore by assignment executed by a duly appointed guardian.[40]

§ 271. Transfers to and by Guardians

Certificates for stock owned by minors or other persons not competent to contract should properly be issued in the name of the trustee or guardian of such person. In most states parties not competent to contract cannot transfer stock and therefore all transfers of stock belonging to such persons must be made by their legally appointed trustees or guardians.

Usually the statutes require the guardian of a minor to be specially authorized by order of a proper court before he may sell stock belonging to his ward, and the corporation cannot safely record a transfer of a minor's stock though made by his guardian until it ascertains the existence of such authority.[41] The guardian should therefore secure proper authority and file a certified copy thereof with the secretary of the corporation before or at the time the transfer is made.

When no statutes regulate the sale of stock by guardians, a guardian may freely transfer stock without any special court authorization,[42] though in this case it is safer for him to obtain authority from the court as a measure of self protection. A guardian has no authority to pledge stock.[43]

§ 272. Transfers to and by Corporations

Under the common law, one corporation cannot hold stock in another.[44] In a number of states, however, corporations are by statute expressly authorized to hold stock of other

[40] Smith v. Baker, 42 Hun (N. Y.) 504 (1886); White v. New Bedford, etc., Corp., 178 Mass. 20 (1901).
[41] Atkinson v. Atkinson, 90 Mass. 15 (1864); O'Herron v. Gray, 168 Mass. 573 (1897).
[42] Lamar v. Micou, 112 U. S. 452 (1884).
[43] O'Herron v. Gray, 168 Mass. 573 (1897).
[44] People v. Chicago Gas Trust Co., 130 Ill. 268 (1889); De La Vergne Co. v. German Savings Inst., 175 U. S. 40 (1899).

corporations, or may be so authorized by inclusion of the power in their charters. Even where this is not the case, the general rule has been relaxed, and it may now be said in general that a corporation may become a stockholder in another corporation wherever the stock is acquired in pursuance of a legitimate purpose of its creation.[45] Hence an investment company, an insurance company, a trust company, and others of similar character, may properly invest in and hold the stock of other corporations. Also corporations may acquire stock by foreclosure proceedings or may take it in order to escape loss, as for instance, in settlement of a debt.[46] Also the so-called "holding" corporations are not uncommon in the present day, which are expressly authorized to hold stock in other corporations and have been organized for this purpose.

In all cases where the corporation properly holds stock, it has all the rights of a stockholder as to such stock, including the right to receive dividends and to have its representatives vote and, when duly elected, act as directors or officers of the corporation by which the stock was issued.[47]

As a rule a corporation may buy its own stock with its surplus profits, if not prohibited by statute and all its stockholders acquiesce.[48] It may not, however, do so except from surplus profits—unless expressly authorized thereto by statute—since such procedure impairs and practically amounts to an illegal reduction of its capital stock.[49]

Transfers of stock held by associations, societies, or corporations must be made under the corporate seal by the duly authorized officers, and must be accompanied by a properly

[45] Booth v. Robinson, 55 Md. 419 (1880); Layng v. A. French Spring Co., 149 Pa. St. 308 (1892).

[46] Robotham v. Prudential Ins. Co., 53 Atl. Rep. (N. J.) 842 (1903).

[47] Camden, etc., R. R. Co. v. Elkins, 37 N. J. Eq. 273 (1883); Rogers v. Nashville, etc., Ry. Co., 91 Fed. Rep. 299 (1898); Windmuller v. Standard Distilling, etc., Co., 114 Fed. Rep. 491 (1902); Oelbermann v. New York, etc., R. Co., 77 Hun 332 (1894).

[48] See 1 Cook on Corp., § 311; Lowe v. Pioneer Threshing Co., 70 Fed. Rep. 646 (1895).

[49] McGill v. Underwood, 161 App. Div. (N. Y.) 30, 32 (1914).

certified copy of the resolution or by-law authorizing the transfer. The certificate of authority should include a designation and statement of the due election of the officers who are to act. Occasionally transfer agents or officers require an exemplified copy of the minutes or by-laws of the organization before they will register such a transfer. (See Form 179.)

When stock is acquired by an association or society not incorporated, it is usually placed in the hands of trustees.

When stock of another corporation is acquired by a corporation authorized to hold such stock, the assignment may run direct to the corporation or to its treasurer or to a trustee for the corporation, though if the stock actually and unreservedly belongs to the corporation, there is no reason why it should not be held in the corporate name. The certificates for such stock, assigned in blank or assigned direct to the corporation—or the treasurer or a trustee if desired—are turned over to the treasurer or other designated officer of the transferee corporation, who presents the certificates for reissue, the new certificates being taken in the name of the transferee as indicated by the completed assignments on the back of the certificates.

When such stock is held in the corporate name and is to be transferred, the corporate signature is affixed to the assignment by the duly authorized officer or officers of the assigning corporation. The corporation which issued the stock, before registering the transfer on its books may and should require proper evidence that these officers were properly empowered to affix the corporate signature. This proof is best supplied in the form of a certified copy of the resolution whereby the transfer of the stock was authorized.

The procedure is much the same where stock is held in the name of the treasurer or a trustee for the corporation, save as to the signature to the assignment.

§ 273. Transfers to and by Partnerships

A partnership may deal in stock as freely as may individuals, and if it is a trading partnership, i.e., a partnership formed for the purpose of buying, selling, or manufacturing,[50] any member of the firm may sign the partnership name to a transfer of stock if this stock is held in the firm name.[51]

The signatures of the individual partners to the assignment are not necessary, the firm name affixed by one of the partners being legally sufficient. The corporation may require evidence when necessary of the assigning partner's membership in the firm.

If stock is issued to the partners as individuals, as "To John Gray and Henry H. Harriman," they are tenants in common and both the individuals named must join in any transfer. The same is true when the stock is held in the firm name if the partnership is not a trading partnership. Thus, if stock is held by a professional firm, even though in the firm name, the partners must sign their individual names to the transfer. In the absence of objection, any partner may vote on stock held in the firm name but in case of disagreement the stock cannot be voted.[52]

One joint owner cannot sell or vote stock standing in the names of two or more, but each name must be signed to its assignment or proxy.[53]

§ 274. Summary of Rules Regulating Transfers

The following rules regulating transfers of stock are those recognized by the trust companies of New York City and are given here as a very clear, concise summary of the general laws governing the subject.

1. The assignment of a certificate should be executed by

[50] Lee v. Bank, 45 Kan. 8 (1890); 11 L. R. A. 238.
[51] Comstock v. Buchanan, 57 Barb., 127 (1864).
[52] Matter of Pioneer Paper Co., 36 How. Pr. 111 (1865).
[53] Tunis v. R. R. Co., 149 Pa. St. 70 (1892); s. c., 15 L. R. A. 665.

the stockholder personally or by duly authorized attorney. In the latter case the assigned certificate should be presented to the transfer officials accompanied by the power of attorney under which the party acts, and the original or a notarial copy of this power should be left on file. Authority to transfer stock should appear in the power of attorney and, if necessary, the authenticity of the signature and the fact that the instrument is still in force must be proved.

2. The signature must be witnessed and must correspond with the name as written on the face of the certificate. Signatures unknown to the transfer agent should be guaranteed by some bank official or acknowledged before a notary public.

3. The name and full post-office address of the transferee should be given in full without abbreviation of any kind. The space for the name of the attorney should be left blank. (The address of the transferee is not entered in the assignment form but may be noted on the certificate or be furnished on a slip attached to the certificate.)

4. The full first name of the transferee should be given. If the transferee is a woman, the prefix "Mrs." or "Miss" should be used. No other prefixes and no suffixes should be used.

5. In transferring to a married woman, use her full Christian name—not that of her husband.

6. In case a new certificate is required because of change of name by marriage, the old certificate should be signed "(Mrs.) Henrietta F. Bowen, formerly (Miss) Henrietta F. Francisco," while in the space for the name of transferee should be placed the name "(Mrs.) Henrietta F. Bowen."

7. Agents, attorneys, executors, administrators, guardians, or trustees should not transfer stock to themselves directly, i.e. as individuals.

8. Transfers to a minor should give the guardian's name; thus, "Frederick McAllison (a minor) under guardianship of

John J. McCall." Transfers to minors should be avoided if possible. Transfers from a minor can be made only by a guardian appointed by the proper court, who must exhibit a duly certified copy of appointment.

9. A transfer by an administrator must be within his authority as evidenced by a copy of his appointment certified by the proper probate authorities.

10. A transfer by an executor must be accompanied by a copy of the will and certificate of appointment, both certified by the proper probate authorities. The copy of the will is returned after inspection by transfer agent.

11. Transfers should not be made to a trustee, agent, or attorney who is not appointed by an instrument in writing. If properly appointed, the transfer must describe the trust by reference to the will or other instrument under which it is created.

12. In transfers by trustees—when more than one—all must sign and the transfer must be accompanied by a properly certified copy of the instrument which authorizes the trustees to sell or transfer such stock.

13. In transferring to a society or institution, evidence should be required, if necessary, that it has power to hold and transfer stock.

14. Transfers by associations, societies, or corporations must be executed by duly authorized officers under seal of the organization, and must be accompanied by a certified copy of the authorizing resolution or by-law.

The regulations also prescribe generally that prompt notice of any change of address of a stockholder, stating the company in which the stock is held, should be sent to the transfer agent for record, and that lost certificates should be reported to the transfer agent as soon as the loss is discovered, with full description of the missing certificate.

CHAPTER XXXVIII

STOCK TRANSFER TAX

§ 275. General

New York State was the first state to impose a stock transfer tax,[1] and has been followed by Pennsylvania[2] and Massachusetts.[3] In the three states the acts imposing the tax and the regulations for their enforcement are substantially uniform. Under each act transfers of stock of all domestic corporations and of all foreign corporations having transfer agencies within the state are taxable. Many corporations of other states have transfer offices in New York, Boston, or Philadelphia. For this reason and for the further reason that other states may be expected to adopt similar legislation, it seems not out of place to summarize the laws and regulations in connection with the general topic of stock transfer.

§ 276. Duties and Penalties

The tax, which is a stamp tax of 2 cents on each $100 of face value or fraction thereof, is imposed on every sale or transfer of stock within the state, whether the corporation is domestic or foreign. Where the shares of stock are issued without designated monetary value, the tax is imposed at the rate of 2 cents for each share. The tax is payable by the person making the sale.

The duties of the corporation are to see that the proper stamps are attached and cancelled before transferring the

[1] N. Y., L. 1905, Ch. 241.
[2] Pa., Act of June 4, 1915, P. L. 828.
[3] Mass., Gen. Acts, 1915, Ch. 238.

stock on the books of the company, to keep a record of transfers in such form as may be required, and to file with the proper officers a certificate showing the state of incorporation and the corporation's transfer office within the state. A failure to perform any of these duties is a misdemeanor, and heavy penalties are imposed.

§ 277. General Rulings

Practically identical sets of rulings governing the collection of the tax have been adopted in each state. These rulings are in substance as follows:

1. The statute does not apply to the original issue of stock.

2. The transfer to and from voting trustees is taxable, also the transfer of voting trust certificates.

3. The mere surrender of a certificate of stock for reissue in smaller denominations is not taxable; but if reissued in part to the original owner and in part to a third party, it is taxable to the extent of the transfer to the third party.

4. Likewise the mere surrender of a certificate of stock held by a deceased person for issuance in the name of his executor or administrator is not taxable; but all transfers made by the latter, whether to trustees, legatees, or other persons, are taxable.

5. While the law has no extra-territorial operation, nevertheless where it appears that the transfer of the stock on the corporate books within the state is essential to render the transfer effectual, it subjects it to a tax although in all other respects made without the state.

6. It is the duty of the person making or effectuating the sale or transfer to pay the required tax by procuring, affixing, and cancelling the stamps, except that where a sale or transfer is shown only by the books of the corporation,

the person making the sale must secure, and the corporation affix, the stamps to its books and cancel them.

7. Where the sale or transfer is effected by the delivery or transfer of a certificate, the stamp must be placed upon the surrendered certificate.

8. Under no circumstances may a stamp erroneously attached to a certificate or memorandum be removed.

Other rulings dealing with the form of records to be kept and like matters vary slightly in each state.

Part IX—Meetings and Records

CHAPTER XXXIX

ANNUAL MEETING OF STOCKHOLDERS

§ 278. The Annual Meeting

The annual meeting of stockholders is prescribed by statute in most states, and elsewhere is required by the charter or by-laws of the corporation. It is the only usual regular meeting of stockholders. If other meetings are necessary, they are "special meetings" and called as required.

Stockholders' meetings must be held within the state of incorporation. In many states the statutes so provide. Elsewhere it is a matter of common law,[1] save in some few instances, as in Delaware, West Virginia, and South Dakota, where the statutes expressly provide that stockholders' meetings may be held out of the state. The principal office of the company within the state is the customary and most appropriate place for stockholders' meetings and in many states is the place designated by statute.

The by-laws usually prescribe the details of the annual meeting, such as the time and place, the notice required, the number necessary to constitute a quorum, the time of closing books, the officers of the meeting, and the order of business. By-law provisions also usually regulate the use of proxies, method of casting votes, and the employment of inspectors or tellers at elections of directors.

[1] Ormsby v. Vermont Mining Co., 56 N. Y. 623 (1874).

Whenever there is any probability of the proceedings of the annual meeting being attacked, or when there are any disputes or differences of opinion among the stockholders of a corporation, every formality in connection with the annual meeting should be carefully observed. Under other circumstances such close observance, though always advisable, is not so essential. If the proceedings are characterized by good faith and are a fair expression of the sense of those present, "mere irregularities in the manner of conducting the business are immaterial." [2]

§ 279. Closing Transfer Books

The corporate calendar (Form 197) should show the exact date prior to the annual meeting on which the transfer books are to be closed to transfers. The object of thus closing the books is to obviate any uncertainty as to who is entitled to receive notice of and to vote at the annual meeting.

§ 280. Notice of Annual Meeting

Notice of the annual meeting is usually prescribed by the by-laws and in some few states is required by statute. Such notice is not, however, of the same vital importance as in the case of special meetings, since the time and place of the annual meeting are specified in the by-laws and are supposed to be familiar to the stockholders. For this reason, failure to send out notice of its time and place as required by the by-laws, while a very serious breach of duty on the part of the secretary, is not ordinarily held to invalidate the proceedings of the meeting, save as to any unusual or specially important business considered thereat.[3] Where notice is prescribed by statute, however, the provision of the statute must be complied with unless waived by all the stockholders.

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[2] 2 Cook on Corp., § 606.

[3] Morawetz, § 482; Warner v. Mower, 11 Vt. 385 (1839); Sampson v. Steam Mill, 36 Me. 78 (1853); Morrill v. Little Falls Mfg. Co., 53 Minn. 371 (1893).

The notice of the annual meeting should specify not only its time and place but also its objects. This is not always legally necessary but is an advisable precaution, particularly when business of special importance is to be considered thereat. "Where unusual business is to be transacted, even at a regular meeting, the notice of that meeting should state the unusual business." [4] In Pennsylvania it has even been held that important amendments of the by-laws cannot be legally effected at the annual meeting unless previously notified to the stockholders.[5] In the larger corporations the by-laws frequently provide specifically that any failure or irregularity in the notice of the annual meeting shall not affect its validity or the validity of any of its proceedings.

Written notice of the annual meeting mailed to the stockholders of record is usually prescribed. This notice should be signed with the official signature of the secretary or other corporate officer authorized thereto,[6] and should be mailed, postage paid, on the date specified in the by-laws—which ranges widely from 5 to 60 days or more before the date of the meeting—to the address of each stockholder as shown by the books of the company. A copy of the notice with date of sending indorsed thereon, should be preserved by the secretary as evidence that proper notice of the meeting has been given.

Publication of the notice of an annual meeting is in some states required by statute, and in all states is customary among the larger corporations. It is, however, a most uncertain and inadequate method of notification and should be used only in connection with notice by mail. Copies of the papers in which the publication notice appears should be preserved by the secretary as proof of due publication, or, if preferred, a copy of the notice may be made and an affi-

[4] 2 Cook on Corp., § 595.
[5] Bagley v. Reno, 201 Pa. St. 78 (1902).
[6] Johnston v. Jones, 23 N. J. Eq. 216 (1872).

davit of the publisher or of the secretary certifying to its due publication be attached. (See Forms 64-66.)

The notice of the annual meeting usually states the dates for the closing and reopening of the transfer books.

§ 281. Preparations for Annual Meeting

It is the secretary's duty to see that all stationery, blanks, and materials and any of the corporate books or documents in his keeping that may be needed at the meeting, are at hand or readily accessible at the proper time. His preparations will also usually include:

1. *Order of Business.* Unless the presiding officer is very familiar with the regular order of business as given in the by-laws of the company, a copy should be prepared by the secretary in convenient form for reference and be handed to the chairman at or before the time he takes charge of the meeting. (See Form 7, Art. II.)

The object of the formal order of business is to insure the systematic and orderly conduct of meetings and of the business of such meetings. The order prescribed is, however, directory, not mandatory as are most of the by-law regulations, and may therefore be suspended at any meeting in whole or in part, either by a majority vote of those present or by their mere assent.[7]

2. *List of Stockholders.* Under the laws of New Jersey and some other states, an alphabetical list of the stockholders entitled to vote at the annual meeting must be prepared by the secretary, be presented at the meeting, and be kept there for the inspection of any stockholder. The requirement is a reasonable one, and a similar list will be found a convenience in any state. Its preparation is frequently made a by-law requirement.

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7 Matter of Wheeler, 2 Abb. Pr. (N. S.) 361 (1866); Matter of Mohawk, etc., R. R. Co., 19 Wend. 135 (1838).

This list of stockholders is made out from the stock books after they are closed to transfers, and gives the names and addresses of the stockholders and the amount of stock held by each. It must be remembered, however, that the company's stock books are the final authority in any such matters and should be at hand for reference in case the accuracy of the list is impugned.[8]

In the smaller corporations the secretary will in addition find an alphabetical list of the stockholders of much convenience for his own use. This list should be arranged with columns in which may be noted those present in person or by proxy, those absent, and the amount of stock held by each. (See Form 103.)

3. *Outline Minutes.* These will be found convenient for the use of the secretary. Properly prepared, they cover all routine business so that a few short pencil notes will usually dispose of these matters, leaving the secretary free to attend to any new or special business that may demand his services. (See Form 104.)

§ 282. Officers of Meetings

No fixed rule prevails as to officers of stockholders' meetings. The regular officers of the company usually serve, but not unless authorized thereto by the charter or by-laws. If no such provision exists, the stockholders elect or appoint the officers of their own meetings. As a rule, the secretary so appointed should be the secretary of the company. To appoint a secretary not familiar with the records, the personnel, and the general condition of the company, is apt to cause delay and confusion and is but seldom advisable.

When the regular officers are designated, the president will take charge of the meeting as a matter of course, or

[8] Johnston v. Jones, 23 N. J. Eq. 216 (1872); Downing v. Potts, 23 N. J. L. 66 (1851).

in his absence the vice-president takes the chair. If both are absent, the treasurer might act as presiding officer. If the treasurer is also absent, the secretary might very properly ask someone present to call the meeting to order, who will then preside until a more permanent chairman is selected, or the secretary might act temporarily himself. If so, he should not preside longer than is necessary for the appointment of a chairman. He cannot act as president and secretary at the same time, and his more important duty is to record the proceedings of the meeting. In the absence of all the regular officers from the meeting, the stockholders appoint a chairman and a secretary *pro tem,* who serve for that meeting.

§ 283. Opening the Meeting

Usually, as stated, the by-laws provide that the president and secretary of the company shall officiate at stockholders' meetings. In such case, at the appointed time and place the president, or in his absence the next ranking officer present, requests the meeting to come to order, and the secretary, if he has not already done so, furnishes the presiding officer with a copy of the order of business and presents a list of the stockholders of the company which remains open during the meeting for the inspection of those present.

§ 284. Roll-Call

In the smaller corporations, the presiding officer after calling the meeting to order requests the secretary to call the roll. Practice varies as to the precise manner of roll-call. Usually the secretary employs an alphabetical list prepared for the purpose and, calling the names if he is not personally acquainted with all the stockholders, notes thereon those present either in person or by proxy, and any absentees. (See Form 103.)

In the larger corporations this plan is not practicable. When the list of stockholders runs far up in the hundreds or thousands, an actual call of roll is obviously impossible. Instead, the chairman first requests the stockholders present in person to report to the secretary. As each reports, reference is made to the secretary's list of stockholders, and if the person reporting is found thereon, his name and the amount of stock he holds are recorded. The chairman then calls for those who represent stockholders by proxy. These also report, each giving the name of the stockholder and the number of shares he represents, handing in his proxy or, after exhibiting the original, a certified copy thereof, as evidence of his right to vote. The statements are verified in each case, and the names of both principal and proxy and the stock represented are duly noted. In this way the number of shares represented and entitled to vote at the meeting is arrived at accurately and expeditiously.

After the secretary has completed the roll-call or annotation of stockholders present, he announces to the chairman the total number of shares outstanding entitled to vote, the number necessary to constitute a quorum, the number represented at the meeting, in person and by proxy, and, if such is the fact, that they constitute a quorum.

If a quorum is present, the presiding officer announces the fact and states that the meeting will proceed to business. If a quorum is not present and no other stockholders can be secured, the meeting may take either one of two courses. It may adjourn *sine die,* which defers the election of directors indefinitely and leaves the existing board to hold over until the next annual meeting or until a special meeting is called for the election of directors, or the meeting may adjourn from day to day or, if the charter or by-laws so permit, to any desired future date, when, if a quorum is secured, the meeting may be held.

The important point to be determined at roll-call is the amount of stock represented. The number of persons present is immaterial. One man, by stock ownership or proxies, or by both, might represent the entire outstanding stock of the company and such meeting, if properly conducted, is legal in this country.[9] In England it has been held that one person cannot hold a meeting.[10] In either country, however, the party in control could avoid all question and satisfy every requirement by giving proxies for one or more shares of stock to convenient parties and allowing the parties thus qualified to participate with him in the meeting.

§ 285. Proxies

A proxy is a special power of attorney executed by a stockholder of the corporation and authorizing some specified person to represent him at one or more stockholders' meetings of that corporation. A party who holds and exercises the powers of a proxy is said to act as a proxy. Any person competent to act as an agent may act as a proxy.[11] (See Chapter LXXIII, "Proxies.")

The right to vote by proxy is not a common law right.[12] It cannot therefore be exercised unless conferred either by constitutional provision as in the case in some states, by statute provision as is the case in many states, or otherwise by charter or by-law provisions.

In the majority of states the statutes prescribe that voting at stockholders' meetings may be either in person or by proxy. In some states the statutes are merely permissive, allowing voting by proxy if provision therefor is made by charter or by-laws. Variations or restrictions of the usual right to vote

[9] Morrill v. Little Falls Mfg. Co., 53 Minn. 371 (1893); see note 21 L. R. A. 174.
[10] Sharp v. Dawes, 2 Q. B. D. 26 (1876); *In re* Sanitary Carbon Co., 12 W. N. 223 (1877).
[11] People's Bank v. Superior Court, 104 Cal. 649 (1894); *Re* Lighthall Mfg. Co., 47 Hun. 258 (1888).
[12] Philips v. Wickham, 1 Paige 590 (1829).

by proxy are found in many states. Thus in New Hampshire no person may vote as proxy, or as principal and proxy, for shares exceeding one-eighth of the whole capital stock. In Maine a general power of attorney authorizing the voting of stock is good until it expires or is revoked, but a proxy must have been executed within thirty days preceding the day of meeting. In Pennsylvania a proxy must have been executed within two months of the date of meeting; in Massachusetts within six months; in New York, California, and Connecticut within eleven months; in Minnesota within one year; in New Jersey, Delaware, North Carolina, and Porto Rico within three years; and in New Mexico within five years.

The original, or a duplicate or certified copy of every proxy should be filed with the secretary of the meeting at which the powers conferred by the proxy are to be exercised, and should be preserved by him in case the validity of the meeting or any of its proceedings should be questioned. If the proxy is a continuing one, it should be filed at the first meeting at which its powers are exercised but need not be filed at subsequent meetings.

§ 286. Quorum

A quorum at stockholders' meetings is the number of shares of stock which must be represented—or the number of members which must be present—to duly constitute the meeting and enable the legal transaction of business. In some of the states the statutes provide that at least a majority of the outstanding stock must be present in order to constitute a quorum. Elsewhere a similar provision is usually inserted in the charter or by-laws of the particular corporation. If no regulating provisions exist, the common law prevails, under which those present at a duly assembled stockholders' meeting are entitled to act, no matter whether they represent a majority of the outstanding stock or otherwise. "The law is clear that those

stockholders who attend a duly called stockholders' meeting may transact the business of that meeting, although a majority in interest or in number of the stockholders are not present."[13]

In the absence of conflicting statutes, the stock necessary to constitute a quorum may be fixed at any amount desired. The usual and best practice requires a majority of all the outstanding stock. A smaller quorum is sometimes prescribed but is not always safe. A majority of a legal quorum may always act. Hence, if less than a majority constitutes a quorum, it is entirely possible that matters of the greatest importance to the corporation will be decided by less than one-fourth of the outstanding stock.

It may be noted that the statutes of a few states—New York among them—reaffirm the common law as to a quorum in the case of meetings for the election of directors.[14] In these states the stockholders, meeting at the duly appointed time and place for the election of directors, have power to act regardless of the amount of stock they represent.[15]

§ 287. Proof of Notice

After the presence of a quorum has been ascertained, the secretary, in response to a request from the chair, should submit proof that due notice of the meeting has been given. For this purpose a copy of the notice should be exhibited with the secretary's certificate as to its due service attached. If greater formality is desired, the secretary's certificate might appear in the form of an affidavit. When less formality is deemed sufficient, the secretary merely presents a copy of the notice with a verbal statement that it has been sent out as required by the by-laws. (See Forms 167-169.)

If notice by publication has been given, the secretary should exhibit copies of the papers containing the notice, or

[13] 2 Cook on Corp., § 607; Morrill v. Little Falls Mfg. Co., 53 Minn. 371 (1893).
[14] Stock Corp. Law (N. Y.), § 25.
[15] Matter of Rapid Transit Ferry, 15 App. Div. (N. Y.) 530 (1897).

copies of the notice with the affidavit of the publisher or of the secretary himself as to its publication. If the formality of an affidavit is deemed unnecessary, the secretary's certification, or even his mere statement, as to the facts of publication will usually suffice.

§ 288. Reading of Minutes

The presiding officer next calls for the reading of any unapproved minutes. The secretary in response reads the minutes of the annual meeting held the preceding year, also the minutes of any special meeting or meetings of the stockholders held during the year. Occasionally it will happen that the reading of the minutes at the preceding annual meeting has been passed or the minutes of preceding meetings have not been approved at such meeting, and the secretary will then go back still further, presenting all minutes of stockholders' meetings that have not been read and approved at some succeeding meeting.

At the close of the reading of each set of minutes or, if preferred, at the close of the reading of all unapproved minutes, the chairman may announce: "If there are no objections, the minutes as read will stand approved"; or a motion may be passed that "the minutes be approved as read."

If errors are discovered, the minutes may be corrected at once or when the reading of the particular minutes is concluded, or at any time previous to their approval. If the errors are obvious or immaterial, the presiding officer may, in the absence of objection, merely direct the secretary to make the corrections. If there is any question as to an alleged error or if the matters are important, the correction of the minutes is best effected by motion. If the motion prevails, the minutes must be amended accordingly and are then "approved as corrected," usually by order of the president or chairman; otherwise by formal motion.

The minutes of an annual or special meeting cannot be approved at a special meeting of stockholders unless so specified in the call for such meeting. Minutes of a directors' meeting are never read at a stockholders' meeting, except for purposes of information or to obtain the stockholders' ratification of acts recorded in the minutes.

The reading of the minutes may be dispensed with, if desired, either by formal motion or, in the absence of objection, by mere announcement of the chairman.

§ 289. Annual Reports

Under the usual order of business the annual reports of officers and committees follow the reading of minutes. The president's report is the first official report to be presented. Following this usually comes the treasurer's report, and if other officers have reports to make or if the board of directors or any committees have reports to submit, they are in order at this time.

Before a report presented at the annual meeting is formally received, it is discussed if necessary and any desired questions asked and answered concerning it. A motion is then made that the report be received and filed, or otherwise disposed of as may be necessary; or, in the absence of objection, its proper disposition may be effected by order of the chairman. If any report proves to be incomplete, erroneous, or otherwise objectionable, a motion may be made to return such report for correction or for revision, or it might even be rejected absolutely, such rejection serving as an emphatic rebuke to the official or committee by whom the report was made.

As reports are ordered received, the secretary, unless it is expressly otherwise ordered, takes charge of and preserves them for future reference. Reports of special importance are sometimes ordered spread upon the minutes, or entered in the

minute book immediately following the minutes of the meeting.

§ 290. Election of Directors

In the larger corporations the annual election of directors is the most important event in the corporate calendar, deciding the management and the general policy of the company for the ensuing year. In small or close corporations, on the other hand, the election of directors is frequently omitted, the directors then in office holding over for another year or until their successors are elected. There is no legal objection to this practice when all the stockholders acquiesce.

Voting for election of directors should be by ballot. In perhaps the majority of the states the statutes require this method to be followed. The election is usually conducted by inspectors or tellers, in some states as a matter of statutory requirement; elsewhere as a matter of by-law provision or merely of convenience. These inspectors or tellers, usually two in number, may be stockholders or otherwise, as seems best to the meeting, but candidates who are to be voted upon at the election should not be appointed. The inspectors take entire charge of the election. At its close they announce the results, or otherwise hand their report to the chairman of the meeting, who reads the results from the inspectors' report. The report is then handed to the secretary for preservation or for such other disposition as may be prescribed.

In the larger corporations the formalities of an election of directors are usually strictly observed. In the smaller corporations such elections are frequently conducted very informally. Where there is entire agreement, the board is sometimes selected by conference, and the secretary—authorized thereto by motion—casts the single ballot of the meeting for the parties named.

Unless otherwise provided by statute or the charter or

by-laws of the corporation, a majority of the votes cast at an election of directors held at a duly constituted meeting elects,[16] even though these are not a majority in interest of all those present at the meeting. In other words, stockholders who do not vote cannot have their votes counted in the negative.[17] The charter or by-laws may, however, in the absence of any conflicting statutes, modify this rule by providing that the votes of a majority of those present at the meeting, or of a majority or any other desired proportion of the outstanding stock, shall be necessary to elect.

If less than the full number of directors to be elected receive the majority or plurality vote necessary to elect, those receiving the required majority or plurality vote are elected and another ballot or another election may be held to elect the remainder.[18] It may be noted that unless the statutes, charter, or by-laws provide that a plurality of votes elect, a majority of all the votes cast is necessary to an election.[19] After the ballot has been counted or announced, it is too late to receive additional votes.

§ 291. Voting at Elections

If the statutes do not prescribe the method of voting at elections of directors, it may be by any desired method that will fairly indicate the will of those entitled to vote.

The stock books of the corporation which show the transfer and ownership of stock are in most states the final and decisive evidence as to who is entitled to vote at corporate elections. If the corporation keeps no other stock book than a stock certificate book, this will be sufficient if it shows the stock transfers and ownership. A stockholder cannot be kept from voting on account of the loss or absence of his stock

[16] 2 Cook on Corp., § 608.
[17] State v. Green, 37 O. St. 227 (1881); Smith v. Proctor, 130 N. Y. 319 (1891).
[18] Wright v. Commonwealth, 109 Pa. St. 560 (1885).
[19] 1 Thompson on Corp., § 846; 2 Cook on Corp., § 608.

certificate, nor can he be denied the voting right because his stock is not fully paid, unless it is expressly so provided by the statutes of the state or the charter of the corporation.[20] A by-law provision restricting the voting right is not ordinarily effective. A corporation cannot vote on its own stock, whether held in the name of the corporation or a trustee for the corporation. Any sale or issue of stock made by the directors to control an election can usually be stopped by injunction, or the courts may be invoked to set the election aside.

The inspectors, tellers, or other officers conducting an election have no authority to refuse the vote of any stockholder of record, nor the right to receive the vote of anyone who is not a stockholder of record. Even when grounds for so doing exist, the courts alone can go behind the corporate records and enjoin stockholders of record from voting, or set aside an election carried by the vote of such stock. The secretary or chairman of the meeting has no authority to decide who may vote, the matter resting with the tellers or other persons conducting the election, who must be governed by the stock books of the corporation.

Under the general rule in regard to voting at elections, a stockholder is entitled to one vote for each director to be elected, for each share of stock standing in his name on the books of the corporation.[21] If there are any variations of this usual rule, such as cumulative voting, classified voting, or restriction of voting to one class of stock, such variation should be stated as clearly as possible in the charter or by-laws of the corporation and must, as a matter of course, conform to the requirements of any state statutes on the subject.

Cumulative Voting. The usual method of voting for directors results in the election of the entire board of directors by those holding a majority of the stock. The cumula-

[20] Downing v. Potts, 23 N. J. L. 66 (1851); People v. Albany, etc., R. R., 55 Barb., 344, 386 (1869); Am., etc., Co. v. State Board, 56 N. J. L. 389 (1894).
[21] 2 Cook on Corp., § 609.

tive system of voting is a modification of this usual method whereby representation on the board may be secured by the minority. Under it, while each share still has as many votes as there are directors to be elected, and these votes may be cast one for each candidate as before, all of these votes, if so desired, may be cast for one candidate or may be divided among any or all of the candidates as the stockholder sees fit. Thus if five directors are to be elected, a stockholder owning one share of stock may, under the cumulative system, cast one vote for each of five candidates but, if he prefers, may cast five votes for one candidate, or two votes for one and three for another, or divide his five votes among the candidates in any other way he sees fit.

The practical result of this modification of the usual system is to insure minority representation whenever the minority holding of stock is at all material. Thus, if a corporation has one hundred shares of stock outstanding and five directors are to be elected, a stockholder owning or controlling 49 shares of this stock would not under the usual system be able to elect a single director. Under the cumulative system he could infallibly elect two directors. Or if he controlled but 34 shares, he could still elect the same number of directors. If he controlled but 17 shares, he would still be able to elect one member of the board.

The calculation is simple. As each stockholder is entitled to one vote on each of his shares for each of the five directors to be elected, this gives him 5 votes for each share held, or 85 votes for his 17 shares. The remaining stock—83 shares—if under one control, gives a total of 415 votes opposed. If, then, the 85 votes of the minority stockholder are cast for one candidate, no possible combination of the opposing 415 votes can defeat him.

In a number of states cumulative voting is prescribed either by the constitution or statutes. In many other states

the statutes permit it but leave its adoption optional with the corporation. In any state where the statutes are not directly or indirectly prohibitive, cumulative voting may be secured by proper provision in the charter or by-laws of the corporation.

Under the system of cumulative voting, it is never possible for the minority stockholders to control, provided the majority act together intelligently. It may be said, however, that when it is employed the majority should understand its workings, or otherwise unexpected results may ensue. If the majority scatter their votes, while a strong minority combine, it would be entirely within the realm of possibility for this minority to gain control of the board.

The board representation secured to the minority interests by cumulative voting is a very material advantage, enabling them to keep in touch with the operations of the company and informed as to any proposed action of the board. The minority cannot interfere with or prevent any proper action, but if these actions are objectionable to them, they are informed in advance and may use such restraining influence as they can. If improper actions are proposed, they may prevent them by legal interference.

§ 292. Other Business

The consideration of any unfinished business follows the election of directors. This includes any matters which were under consideration but not disposed of at any prior stockholders' meetings, whether regular or special. Matters referred to committees for consideration, or investigation, or report come under this head and may be acted upon at this time.

The secretary usually brings up any matters of unfinished business, but the stockholders or the chairman himself may properly call them to the attention of the meeting.

If there is no unfinished business, or otherwise upon its disposal, the presiding officer passes on to the next order of business and inquires if there is any new business to be brought before the meeting. Under this head come any matters requiring the attention of the meeting not before considered. These may be brought up either by the officials of the meeting or by any of the stockholders present.

§ 293. Adjournment

After the disposal of any new business brought before the meeting, adjournment is in order. This may be by motion. Usually, however, when this point is reached the chairman inquires if there is any other business before the meeting, and, if no response is received, declares the meeting adjourned. Such adjournment is *sine die,* i.e., final.

If the business of the meeting cannot be completed at the one session, or if any other reasons render its continuation desirable, it is not adjourned *sine die,* but to such convenient future date as may be decided upon. An adjournment of this kind is usually by motion, but if it is obviously desirable or advisable, the chairman might properly adjourn the meeting himself, merely announcing: "If there is no objection, the meeting stands adjourned until . . . ."

Adjournment may be made only by consent of a majority of those present, and the chairman has no power to declare a meeting adjourned in defiance of this majority. If he does so notwithstanding, any stockholder may demand a vote, and, if this vote is against adjournment or if the chairman should decline to put the matter to vote, a majority of the stockholders may remain and continue the meeting, electing a new chairman if necessary, and even adjourning to another room.[22]

If the meeting adjourns, the adjourned meeting is regarded as a continuation of the original meeting and need not

[22] State v. Cronan, 23 Nev. 437 (1897).

therefore be again notified to the stockholders. If the adjournment is for more than a few days, however, it is always proper for the secretary to send out notice of the adjourned meeting a reasonable time before it convenes.

As an adjourned meeting is, from a legal standpoint, merely a continuation of the original meeting, the same officers preside and any business that might have been transacted at the first meeting may be acted upon at its adjournment, or at any adjournment from an adjourned meeting.[23]

§ 294. Signing Minutes

As soon after the meeting as convenient and while its details are fresh in his mind, the secretary should write up its proceedings in the minute book and sign them with his name and official designation. The presiding officer also usually affixes his signature.

The minutes are the legal evidence of the proceedings of the meeting, and this double signature is of advantage in event of any dispute as to the accuracy of the record. (See Chapter XLII, "Minutes of Meetings."

[23] People v. Batchelor, 22 N. Y. 128 (1860); Staats v. Borough of Washington, 44 N. J. L. 605, 611 (1882).

CHAPTER XL

SPECIAL MEETINGS OF STOCKHOLDERS

§ 295. Special or Called Meetings

"Special" or "called" meetings are held when matters demanding the attention of the stockholders arise in the interim between annual meetings. As in the case of annual meetings, special meetings of stockholders must be held within the state in which the corporation was organized, unless otherwise expressly permitted by statute or charter provision, and usually at the principal office of the corporation. Statutory provisions regarding special meetings are found in a number of states. These mainly relate to the method of calling or notifying such meetings.

Special meetings differ from the annual meeting in the following important details: (1) They must be authorized by a more or less formal call. (2) Notice of the time, of the place, and of all business to be transacted at the meeting must be given each stockholder of record. (3) No other business save that so notified may be transacted at the meeting.

The formalities of special meetings must be strictly observed, or action taken thereat may be invalidated. They may, however, be waived by consent of every interested party, either formally expressed in writing, or indicated by their presence at, and participation or acquiescence in, the meeting. (Form 46.)

§ 296. Call for Meeting

The time and place of special meetings cannot, from the nature of the case, be prescribed by the by-laws and hence

each meeting must be formally called as the necessity arises. The manner of this call is sometimes prescribed by statute or charter but is usually left for the by-laws. If neither the statutes, charter, nor by-laws prescribe the manner of calling special meetings of stockholders, the directors may always do so by resolution,[1] or the stockholders may unite in calling a meeting, which, provided the number joining in the call represents a fair proportion of the outstanding stock and the time and place is reasonable, will be legal. (See Form 52.)

Ordinarily the by-laws provide that special meetings may be called in any one of four ways: (1) By written call signed by the president (Forms 47, 48); (2) by resolution of the directors (Form 51); (3) by written call signed by two or more directors (Forms 49, 50); (4) by written or published call subscribed by a specified number of stockholders, or a certain proportion of the outstanding stock, usually ranging from one-third to a majority (Forms 52, 54).

The call and notice for a special meeting must state its time, place, and purpose.[2] These essentials every stockholder is entitled to know, and the omission of any one might invalidate the entire action of the meeting. *No business except that which has been specified in the call and in the notice which follows the call, can be legally transacted at a special meeting.*[3] To end the call or notice, as is frequently done, with some general phrase, such as "and all other matters that may come before such meeting," does not add to the scope of the meeting in any way and does not in itself legally authorize the consideration of anything.[4]

Where a company with but few stockholders is to be assembled in special meeting, time may be saved by employment of the combined call and waiver of notice (Form 46). This

[1] Commonwealth v. Smith, 45 Pa. St. 59 (1863); Cassell v. Lexington, etc., Co., 9 S. W. Rep. 502 (1888).
[2] 2 Cook on Corp., § 595.
[3] Clark & Marshall on Corp., § 647.
[4] Morawetz on Corp., § 482; People's Ins. Co. v. Westcott, 80 Mass. 440 (1860).

requires the signature of every stockholder to make it effective, but the meeting so authorized may be held at once, and, if so agreed, any business within the powers of the stockholders may be transacted thereat. A provision in a duly signed call and waiver for the "transaction at such meeting of any and all business pertaining to the affairs of the company," is effective, since everyone interested has agreed thereto.[5] (See Chapter LXX, "Calls and Waivers.")

The first meeting of stockholders is merely a form of special meeting and is usually assembled by call and waiver signed by all those entitled to be present (Form 31).

§ 297. Notice of Special Meeting

The call for a special meeting must not be confused with the notice of such a meeting. The call is the written authority or instructions, usually handed or sent to the secretary, pursuant to which the meeting is to be assembled. (See Forms 46-49.) The notice, on the other hand, is the actual statement of the time, place, and purposes of the meeting, sent out to the stockholders, usually by the secretary, in obedience to the instructions of the call and in accordance with its terms.[6] If there is any material difference as to these between the call and the notice, the meeting is invalidated thereby. The time means both the day and the hour. No business other than that specified in the notice may be transacted at a special meeting. If one single stockholder is not properly notified, he may be able to set the entire proceedings of the meeting aside. (See Chapter LXXII, "Notices of Meetings.")

When, as is usually the case, notice of a special meeting must be sent by mail to the "last known address" of each stockholder, or to his "address as it appears on the books of the corporation," the secretary must be prepared to make

[5] 2 Cook on Corp., § 599.
[6] 1 Morawetz on Corp., § 482.

affidavit, if necessary, that this has been done. If no special method of service or publication is prescribed by the statutes, the by-laws, or other corporate regulation, the secretary must himself or by deputy give personal notice by placing a copy of the notice in the hands of each stockholder.[7] If no time is prescribed, notice must be served a "reasonable time before the meeting." [8] When notice is requested to be given a certain number of days before the meeting, the time should be counted exclusive of the day of notice and the day of meeting, though in New York by statute provision but one of these days need be excluded.

If the secretary refuses to give proper notice of a special meeting after it has been duly called, anyone interested may send out the notice, and such notice, if in due form and properly served on each stockholder, will be effectual.

§ 298. Consent Meetings

Special meetings of stockholders may be assembled at any time without the usual call and notice if all interested sign a formal waiver thereof.[9] Also, if without any such waiver, all the stockholders assemble in meeting, no matter how called or whether called at all, it is termed a "consent meeting," and, all present acquiescing, any business within the stockholders' powers may be transacted thereat.[10] Those present and participating in such meeting are thereby estopped from later objection to any informality of call or notice, and, as all concerned are present, no one is left who has a right to object.

When consent meetings are held, it is important that the minutes shall show the presence of every stockholder. Also

[7] Stebbins *et al.*, Admrs. v. Merritt *et al.*, 64 Mass. 27 (1852); Tuttle v. Mich. Air Line R. R. Co., 35 Mich. 247 (1877).
[8] *Re* Long Island Railroad, 19 Wend. 37 (1837); Covert v. Rogers, 38 Mich. 363 (1878).
[9] 3 Clark & Marshall on Corp., § 647, note 278.
[10] Handley v. Stutz, 139 U. S. 417 (1890); *In re* Griffing Iron Co., 63 N. J. L. 168 (1898); affd., 63 N. J. L. 357 (1899).

if the action taken is important, it is always advisable that every person present shall either sign the minutes, which is the most effective evidence of attendance and acquiescence, or otherwise sign a waiver of the formalities. (See Form 46.)

In a small or close corporation consent meetings can be readily assembled and are the rule when special meetings are necessary. In the larger corporations such meetings are in most cases obviously impossible.

§ 299. Opening Formalities

The procedure for opening a special meeting is the same as in the case of the annual meeting (§ 283). The alphabetical list of stockholders required by statute in some of the states at the annual meeting of stockholders, is not required at special meetings unless directors are to be elected.

The proof of proper call and notice of the meeting follows the roll-call. The secretary should present the original duly signed call; also a copy of the notice sent out pursuant to the call, with his certificate attached showing that the notice was properly addressed and mailed to each stockholder the necessary number of days before the date of the meeting. The call and notice may be ordered received and filed as in the case of a regular meeting, or, as the validity of the meeting is dependent upon its due assembling evidenced by the call and notice, they may very properly be ordered spread upon the minutes.

If the meeting has been assembled by call and waiver signed by all the stockholders of the company, this instrument should be presented to the meeting and may be properly included by the secretary in his minutes without instruction.

§ 300. Special Business

Minutes of previous stockholders' meetings cannot properly be approved at a special meeting unless so provided in

the call and notice or other authorization of the meeting, nor can any other business be transacted save that so specified.[11] Hence the particular business for which the meeting was called should be taken up at once. The presiding officer, or at his request someone present, states the purposes of the meeting and makes such explanations as may be necessary. Or the presiding officer may call upon the secretary to read the notice of the meeting in which its purposes are set forth and then call upon someone familiar with the matter to explain it to the stockholders. After such statement and explanation and any desired discussion, someone interested usually presents and moves the adoption of a resolution covering the matter. The meeting may then, at its discretion, dispose of this resolution in any parliamentary way.

§ 301. Adjournment

As already stated, no business of any kind may be transacted at a special meeting save that specifically authorized. As soon, therefore, as the particular business for which the meeting was called is disposed of, nothing is left but adjournment. This may be by motion, or, if no one objects, the president may merely state that "no further business being before the meeting, it stands adjourned."

A special meeting may be adjourned to another day just as may an annual meeting, and at the adjourned meeting any business set forth in the notice for the original meeting may be considered. New business cannot, however, be introduced or considered. No notice of an adjourned meeting is necessarily sent to stockholders.

[11] Warner v. Mower, 11 Vt. 385 (1839); People's Mut. Ins. Co. v. Westcott, 80 Mass. 440 (1860); Atlantic De Laine Co. v. Mason, 5 R. I. 463 (1858).

CHAPTER XLI

MEETINGS OF DIRECTORS AND OF STANDING COMMITTEES

Directors

§ 302. Time of Meetings

The by-laws usually set forth the general details of directors' meetings. The board itself may provide for any details not already prescribed by some competent authority.

Special meetings of directors are called when the necessity arises. Regular meetings are held at specified times—commonly once a month—usually fixed by the by-laws. In the smaller corporations with boards consisting of a few members easily assembled in special meeting, and also in the larger corporations whose affairs are conducted mainly by standing committees, regular board meetings once a quarter, or even at longer intervals, are frequently sufficient.

§ 303. Place of Meetings

The usual place for meetings of directors is the principal office of the corporation in the state of its creation. Directors' meetings may, however, be held elsewhere, either within the state,[1] or without the state in the absence of prohibition,[2] if properly authorized by the charter, the by-laws, or by due resolution of the directors. If prohibited by statutes, charter, or by-laws, meetings outside the state are void, and their actions of no effect.[3]

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[1] Corbett v. Woodward, 5 Sawy, 403 (1879); Ashley Wire Co. v. Ill. Steel Co., 164 Ill. 149 (1896).

[2] 3 Cook on Corp., § 713a; Saltmarsh v. Spaulding, 147 Mass. 224 (1888).

[3] Brockway v. Gadsden, etc., Co., 102 Ala. 620 (1893); Union Nat. Bk. v. State Bank, 155 Mo. 95 (1899).

In a majority of the states the statutes provide that director's meetings may be held outside the state if authorized in some specified manner—usually by the by-laws, in some states by the charter, in others by either, but in one or two states by mere resolution of the directors. In New York meetings of directors may be held outside the state unless otherwise expressly provided in the charter or by-laws.[4] Other provisions affecting directors' meetings outside the state are found in a number of states.

§ 304. Purposes of Meetings

At duly assembled regular meetings of directors, any business within the power of the board may be transacted. At special meetings, unless otherwise agreed by every member of the board, only such business may be acted upon as is set forth in the call and notice of the meeting. If, however, the notice of a special meeting does not specify its purposes, any ordinary business affairs of the corporation may be transacted thereat, unless the by-laws specifically provide that only such business as has been duly notified may be transacted at special meetings of the board.

§ 305. Assembling Meetings

The time and place of regular meetings are usually prescribed in the by-laws, are supposed to be known to the directors, and do not depend for their legality upon calls, waivers, or notices.[5] Notices are, it is true, generally provided for in the by-laws, but this is a practical measure to insure the attendance of directors, and is not in compliance with legal requirements. To prevent any question on this point, however, the by-laws of the larger corporations customarily provide that failure to send out notice of a regular meet-

[4] N. Y. Bus. Corp. Law, § 2.
[5] Whitehead v. Rubber Co., 52 N. J. Eq. 78, 82 (1893); Western Imp. Co. v. Bank, 103 Iowa 455 (1897); Atlantic, etc., Co. v. Sanders, 36 N. H. 252 (1858).

ing shall not affect its legality nor the legality of any action taken thereat.

Special meetings, on the other hand, are assembled as the necessity arises, must be called by proper authority, and must be formally notified to every member of the board, unless these formalities are duly waived. Accordingly special meetings of the board are assembled by means of the call followed by notice, or by means of a combined call and waiver of notice. Or if all the members of the board can be gotten together, a special meeting may by agreement be held at any time and without formality. These methods of assembling meetings of directors are discussed in the sections which follow. (See Chapter LXXI, "Calls and Waivers for Directors' Meetings.")

§ 306. Call for Special Meetings

The call for a special meeting of directors is the formal instrument which authorizes its assembling, specifying its time, place, and purposes, and usually directing or otherwise obligating the secretary to notify such meeting to the members of the board.

In some few states the statutes prescribe by whom special meetings of directors may be called. In the majority of the states the matter is left entirely for by-law regulation. These almost invariably empower the president to call special meetings, usually alone, but sometimes in conjunction with some other officer. Usually they provide that two or more of the directors may call such meetings. Occasionally a certain proportion in interest of the stockholders are authorized thereto. Whether so specified in the by-laws or not, special meetings of directors may always be called by due resolution of the board. Consent meetings are assembled informally. (See § 309.)

The call for a special meeting of directors by whomsoever issued, to be legally effective, must always specify the time of

meeting and its place, and if business of special importance is to be considered this must also be set forth.

The place is usually—though not necessarily unless so specified by statute or by-laws—the principal office of the corporation within the state of incorporation. (See § 303.) In the absence of conflicting provisions, special meetings may be called to meet at any reasonable place in the discretion of the party or parties issuing the call.

The time at which the meeting is to be held must be reasonable, and must be definitely stated, both day and hour being given. The particular business to be transacted must be specified with reasonable detail, and ordinarily no other business may be transacted at such special meeting.

§ 307. Notice of Special Meetings

When a call in due form for a special meeting of directors is handed to the secretary, it is his duty to send out notices of the meeting thereby authorized. These notices are sent in such manner—usually by mail or telegraph—and at such time before the meeting as is prescribed by the by-laws, or otherwise as will under ordinary conditions permit the attendance of all the members of the board.[6]

The by-laws also frequently prescribe that no business save that specifically set forth in the call and notice shall be considered or acted upon at such special meetings. If not so prescribed, a notice specifying time and place, but not the business to be transacted, is sufficient to authorize all ordinary corporate business.[7] It is otherwise if important or unusual business is to be transacted at the special meeting.[8]

When the by-laws do not prescribe the specific details of

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[6] People v. Albany Medical College, 26 Hun (N. Y.) 348 (1882); Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149 (1896); Stockton, etc., Works v. Houser, 109 Cal. 1 (1895).

[7] *In re* Argus Co., 138 N. Y. 557 (1893); Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149 (1896).

[8] Mercantile Library Hall Co. v. Pittsburg, etc., Assoc., 173 Pa. St. 30 (1896).

notice, both its time and manner must be reasonable. Just what constitutes reasonable notice of special meetings of directors is a matter on which judicial decisions vary, and should therefore be settled by express by-law provision. (See Chapter LXXII, "Notices of Meetings.")

It is always presumed that notice duly mailed with postage prepaid to the last known address of each member of the board is received by the party addressed. It is, however, usually provided in the by-laws that notice given in this manner shall be sufficient. When this is done, it is immaterial whether or not the notice is actually received.[9] Notice by postal card is sufficient when this method of notification is customary. Any irregularity in call or notice may be cured by a ratification of the special meeting or of the business transacted thereat at a subsequent regular meeting of the board, or, if all the members are present at and participate in a special meeting, this in itself cures any defect in call or notice.[10] Unless cured in some way, failure to give notice to any one director invalidates the action of a special meeting.[11]

§ 308. Call and Waiver of Notice

The call and waiver of notice of a special meeting of directors is merely a call for the meeting combined with a waiver of the usual formalities of notice. This must be signed by every member of the board, but when so signed authorizes a meeting to be held at the time and place, and for the transaction of the business specified therein. Whenever the members of the board are readily accessible, the call and waiver is the preferable method of assembling special meetings. (See Form 55.)

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[9] Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149, 159 (1896); Haj v. Amer. Bottle Co., 182 Ill. App. 636, 641 (1913).

[10] Minneapolis Times Co. v. Nimocks, 53 Minn. 381 (1893); Chase v. Tuttle, 55 Conn. 455 (1888).

[11] People v. Batchelor, 22 N. Y. 128 (1860); Relley v. Campbell, 134 Cal. 175 (1901); Broughton v. Jones, 120 Mich. 462 (1899); Hill v. Coal Co., 119 Mo. 9 (1893).

§ 309. Consent Meetings

If all the members of the board of directors are gotten together or find themselves together, *and all agree to hold a special meeting,* it may be held then and there, and any desired business transacted thereat without further formality. Such a meeting is usually termed a "consent meeting," and in New York and some few other states is recognized by statute law. Elsewhere such a meeting is valid under the common law.[12] (See Form 56.)

§ 310. Opening Directors' Meetings

At the time appointed for the meeting, the president of the corporation—or the chairman of the board, if such official exists—or in his absence the vice-president, calls the meeting to order. Should these officers be absent, the next ranking officer of the corporation, if a member of the board, presides. Should such officer be the secretary, he should merely call the meeting to order, and then request some other member of the board to act as chairman, or, if objection is made, the appointment should be effected by motion.

If no officer of the corporation who is also a member of the board is present, it is proper for any member of the board in attendance to call the meeting to order, and in the absence of objection ask some one to act as chairman. If there is objection, the appointment should be made by means of a motion.

No formal roll-call of a directors' meeting is usual, the secretary merely noting the names of those present, which names are later entered on the minutes. If there is no quorum, business may not be transacted at that session, but the meeting may adjourn from day to day, if desired, until a quorum is secured.

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[12] Minneapolis Times Co. v. Nimocks, 53 Minn. 381 (1893); Bank of Nat. City v. Johnston, 60 Pac. Rep. 776 (1900).

Formal submission of proof of notice of a directors' regular meeting is not necessary unless called for by the president or some member of the board. The secretary should, however, preserve a copy of the notice sent out and indorse upon it the fact that it was duly mailed on the date given thereon to the last known address of each member of the board.

In the case of special meetings of directors the call and notice, or call and waiver of notice as the case may be, should be submitted to the meeting and be entered on the minutes in full with a statement of the circumstances. The matter is of importance, as the due call of the meeting with sufficient notice to each member is absolutely essential to its legality.

At a regular meeting of directors the order of business as set forth in the by-laws is followed, unless set aside by formal motion or unanimous consent. At a special meeting it is but seldom applicable.

§ 311. Quorum

The number required for a quorum at directors' meetings should be fixed by the charter or by-laws.[13] In New York this cannot be a number less than one-third of the full[14] membership of the board. Where there is no provision in the charter or by-laws, the common law prevails, and a majority of the whole board is necessary for a quorum.[15] A majority of the board in this connection is a majority of the whole number constituting the board, and not of some reduced number resulting from vacancies or removals.[16] A majority of a quorum can decide any question properly brought before the meeting.[17]

Directors cannot vote by proxy at directors' meetings, but

[13] Hoyt v. Thompson's Ex., 19 N. Y. 207 (1859); Craig Medicine Co. v. Merchants' Bank, 59 Hun (N. Y.) 561 (1891).
[14] N. Y. Gen. Corp. Law, § 34.
[15] Wells v. Rubber Co., 19 N. J. Eq. 402 (1869).
[16] Moore v. Rector, 4 Abbott's N. Cas. (N. Y.) 51 (1873).
[17] N. Y. Gen. Corp. Law, § 43; Wells v. Rubber Co., 19 N. J. Eq. 402 (1869); Foster v. Mill Co., 92 Mo. 79 (1887).

must be personally present in order to act thereat.[18] No legal authority exists for permitting directors to vote or to be considered as present when merely connected by telephone, nor for permitting an absent member to sign the minutes of the directors' meeting and be counted present, though any action so taken may be validated by action at a subsequent meeting where a quorum is really present.

A director cannot legally vote at directors' meetings on a matter in which he is personally interested, nor is such action usually valid if he is counted to make a quorum when such a question is put to vote.[19]

§ 312. Reading the Minutes

As a matter of due parliamentary procedure, any unapproved minutes of preceding directors' meetings should be read and approved or be otherwise disposed of at a regular meeting of directors before any other business is considered. If, however, time is pressing, the president sometimes directs that the reading of the minutes be dispensed with, or the same end is accomplished by formal motion.

The minutes of stockholders' meetings are never read at directors' meetings unless as a matter of information or by special request, nor if read would their approval by the board be of any legal effect. The minutes of any preceding board meeting should not be approved at a special meeting unless the approval of such minutes was specifically mentioned as one of the purposes of the meeting. (See § 322.)

§ 313. Reports

At a regular meeting, after disposal of the minutes, the president takes up the next order of business and calls for reports from officers first, and then from committees, if any

[18] Perry v. Oil Co., 93 Ala. 364 (1890); State v. Perkins, 90 Mo. App. 603 (1901).
[19] Curtin v. Salmon River Co., 130 Cal. 345 (1900); Miller v. Crown Perfumery Co., 57 Misc. (N. Y.) 383 (1908); Jacobson v. Brooklyn Lumber Co., 184 N. Y. 154 (1906).

are to report. When a report is made it may be disposed of by motion, or, if there are no objections, the president himself may direct that the report be received and filed. A verbal report does not require any formal disposal, the secretary reporting its substance in the minutes as a matter of course.

§ 314. Unfinished and New Business

The business of a special meeting is, as a rule, all new business. It is set forth in both the call and notice, and may be presented by the presiding officer, or he may call on the secretary or some member of the board for its introduction.

At regular meetings of directors it usually rests with the secretary to bring up any matters of unfinished business. New matters requiring attention are brought up by the president or by any member interested.

The election of officers does not appear upon the regular order of business, as it takes place but once a year. It therefore comes under the head of "New Business," and at the proper meeting may be taken up at any suitable time when new business is under consideration. Usually the by-laws provide that the election of officers shall be held at the first directors' meeting after the annual meeting of stockholders.

Officers are usually elected by ballot though in the absence of express provision the board may follow any method that will secure a fair expression of the wishes of its members.

When the board is agreed as to who are to be elected, time is frequently saved by instructing the secretary to cast the single ballot of the meeting for the recited list of officers. Or a mere motion unanimously carried that the named persons be respectively appointed to the specified offices, is legally sufficient. The election of officers by the board is sometimes held to be more in the nature of an appointment than of an election.[20]

[20] State v. Kupferle, 44 Mo. 154 (1869).

Unless otherwise specified by the by-laws or prevented by conditions, the officers-elect may at once begin the discharge of the duties of their respective offices. Frequently the newly elected president and secretary take charge of the meeting immediately after the result of the election has been announced.

A person cannot be made an officer against his will.[21] Acceptance of the position to which an officer-elect has been appointed is therefore necessary. This may either be expressed, or be indicated by the performance of the duties of his office, or even by his failure to decline the office when properly notified of his election thereto.[22]

§ 315. Adjournment

When the business of a meeting has been finished, or when for any reason the board cannot longer continue in session, an adjournment should be taken, either *sine die,* which terminates the meeting absolutely, or, if important business is left unfinished, to some specified future date.

A meeting adjourned to some future time is on reassembling legally regarded as a continuation of the original meeting, may transact any business that could have been transacted at the original meeting, and does not necessarily require any notification to the members of the board.[23]

Standing Committees

§ 316. Procedure at Meetings

The general rules governing the meetings of a standing committee are the same as those for meetings of the board.[24] Special meetings must be duly notified to every member of the

[21] Blake v. Bayley, 82 Mass. 531 (1860).
[22] Danville, etc., Co. v. Brown, 90 Va. 340 (1893); Lockwood v. Nat. Bank, 9 R. I. 308 (1869).
[23] Smith v. Law, 21 N. Y. 296 (1860); Western Imp. Co. v. Bank, 103 Iowa 455 (1897).
[24] Met. Tel. Co. v. Domestic Tel. Co., 44 N. J. Eq. 568 (1888); McNeil v. Chamber of Commerce, 154 Mass. 277 (1891).

committee unless waived by formal agreement or by the presence of every member at the meeting. Actions taken at meetings of the committee should be expressed by means of duly adopted motions or resolutions, and careful minutes of all proceedings should be kept in a minute book provided for the purpose, and not in the minute book of the directors. The committee proceedings should from time to time be reported to the board, either by direct report or by submission of the committee minutes.

Unless otherwise expressly provided, the majority of any standing committee constitutes a quorum, and a majority of that quorum has power to act.[25]

[25] Burleigh v. Ford, 61 N. H. 360 (1881); State v. Jersey City, 27 N. J. L. 493 (1859); McNeil v. Boston Chamber of Com., 154 Mass. 277 (1891).

CHAPTER XLII

MINUTES OF MEETINGS

§ 317. The Corporate Books

The financial records of a corporation are much the same as those of a firm or individual. Some of their entries and accounts are peculiar to the corporation but the books do not differ from those of any other form of business organization. (See § 329.)

The more important books of record peculiar to the corporation are the minute book, the stock certificate book, the transfer book, and the stock book and stock ledger, all of which are kept by the secretary of the corporation.

§ 318. The Minute Book

The minute book of a corporation properly kept is legal evidence of the proceedings of its stockholders' and directors' meetings. The secretary is its custodian and its entries should be made by him alone. Any director has the right to inspect this book at any suitable time. A stockholder usually does not have this right.

The minute book is ordinarily a blank book of the style termed "record" by stationers. It may be had at any price from plainly bound books at 50 cents or less, up to elaborately bound and specially printed books costing from $5 to $25 or even more. A reasonably good and substantially bound book is always to be desired.

The minute book varies in size and general form according to the taste or requirements of the secretary. A common and convenient form is 8½ x 13 inches. Sometimes the book

is specially made, of a size and style to match the other corporate records. For a small corporation with few meetings, a book containing 100 pages will usually be found amply sufficient.

When the minutes are kept in a substantially bound volume with longhand entries succeeding each other in regular order, later additions or insertions are difficult if not impossible, and their evidence as to proceedings at the company's meetings is difficult to controvert.

Minutes are, however, not infrequently written with the typewriter on sheets of thin paper, which are then pasted in the minute book. Also at times loose-leaf minute books are employed, in which the pages may be removed and, after the minutes are written upon them, be reinserted in the book. When either of these plans is followed, substitutions and alterations in the minutes may be made with comparative ease and their value as evidence is diminished.

To avoid this objection to the convenient loose-leaf minute book, each page is sometimes water-marked with its proper number in such manner that substitution is extremely difficult and practically impossible. The same end is sometimes accomplished by the inscription of the president's and secretary's signatures or initials on each page, making substitution without the participation of these officials impossible. It is obvious that this latter method of verification may also be effectively employed when minutes are pasted into the minute book.

§ 319. Contents of Minute Book

A copy of the company's charter or certificate of incorporation is usually entered on the first pages of the minute book. This may be a copy certified by the Secretary of State, bound or pasted into the book, or, equally sufficient, a careful and legible copy written in the book by the secretary, or, if written on separate sheets, bound or pasted into the

minute book. If the copy is made by him, the secretary usually certifies to its correctness.

Following the charter come the by-laws of the company. These begin at the top of the next right-hand page and should also be a careful and legible copy, or a copy bound or pasted in, followed by the secretary's certificate as to the accuracy of the transcription.

A few pages immediately following the by-laws should be left blank for the entry of any amendments. Then follow the minutes of the first meeting of stockholders closely followed by the proceedings of the first meeting of directors, and thereafter the minutes of stockholders' and directors' meetings in due sequence as held, each with its distinctive heading. Each meeting should begin at the top of its proper page and no blank pages should be left between the records of the different meetings.

In the larger corporations separate minute books are provided for stockholders' and directors' minutes and also for the minutes of standing committees. In the smaller corporations a single minute book will usually suffice.

§ 320. Form and Subject Matter of Minutes

The secretary should spare no pains to secure accuracy in his minutes as they are the legal evidence of the proceedings of the meetings recorded and the authority for any action of the officers required thereby.

The minutes given in the present volume (Chapter LXXVI) are in conventional form. Any clear statement of the proceedings is, however, legally sufficient, though a reasonably close adherence to the conventional arrangement is desirable.

It is usual to enter on the minutes of directors' meetings the names of those present. Save in the case of very small corporations, this is not customary nor necessary in the case

of stockholders' meetings. The secretary should, however, preserve the lists (Form 103) showing the names of stockholders present at meetings.

During the progress of meetings, letters, reports, and other instruments are frequently presented. When of importance, the secretary is usually instructed to enter these upon the minutes. If not instructed, he may use his discretion. If the matters to which they relate are important, they should usually be spread upon the minutes, i.e., entered in full. Generally, however, it is sufficient if the instruments be filed and preserved, such reference being made to them in the minutes as the conditions may demand.

When reports or other instruments are ordered spread upon the minutes, the secretary may usually exercise his discretion as to whether they shall be included in the body of the minutes or follow immediately after them. If, however, the motion or order directs that the instrument follow the minutes, or that it appear in the body of the minutes, the secretary should comply with the letter of his instructions.

§ 321. Recording the Proceedings

The corporate minutes are a record of the transactions of corporate meetings—a record of what is done, not of what is said; and the record should usually be as concise and accurate as possible.

If a motion or resolution is passed upon at a meeting, no matter whether adopted or rejected, its disposition should be recorded, but, speaking generally, the debate and discussion should not be set down, nor are the names of the parties by whom minor motions or resolutions are made or seconded of sufficient importance to be entered, nor need any record be made of those voting for or against any such matter.

It may be said further that when the presiding officer decides that a motion or a resolution is properly before the

meeting and puts it to vote, the fact that the names of the parties who moved and seconded it or who voted for or against it are not recorded, does not affect the force of the corporate action. If, however, a motion or a resolution is of importance, or is contested, or of such a nature that it may thereafter be of importance to know by whom the matter was introduced and by whom it was favored and opposed, the record should be made in full.

It sometimes happens that a stockholder or a member opposing some proposed action wishes his objections or protest recorded in the minutes. If his objections are pertinent and not too lengthy, this should usually be permitted, but the secretary should not enter any such objections upon his record unless so directed by a vote of the meeting or by unopposed direction of the presiding officer.

The objecting member sometimes files his protest in writing and in such case the document should be received and filed in the usual course of business, and this fact be noted in the minutes. In some cases it is necessary for a member of the board to have the dissent to proposed action noted in order to avoid liability. In such case he has a right to demand its entry upon the minutes, and, if refused, may force its entry by proper legal procedure.

Motions are not usually entered verbatim. It is sufficient if their sense is preserved. Resolutions are, however, more formal and should usually be entered in the exact form in which they are adopted. (See Chapter LXXIV, "Forms of Motions and Resolutions.") The presiding officer of the meeting may always require resolutions and important motions to be reduced to writing before consideration, and if he does this the work of the secretary is greatly lightened.

All papers presented to or used at meetings should be filed for future reference in the custody of the secretary unless otherwise ordered.

Notes of the proceedings are taken as the meeting progresses, and these should be written up in permanent form as soon after the meeting as possible while the events are fresh in the secretary's mind. Should he delay the final entry of his record unduly, doubt may arise as to whether the secretary's notes, or the record of the minute book is the original entry, and if it should be held that the formal minutes are not the original entry, their value as evidence is destroyed. If minutes are used as evidence, the secretary will be asked when he wrote up his final record.

As soon as the minutes are duly entered in the minute book, they should be signed with the official signatures of the secretary and the presiding officer of the meeting, the secretary usually signing at the right and the presiding officer at the left.

§ 322. Approval and Amendment of Minutes

Minutes should be approved by the body whose proceedings they record. The approval of stockholders' minutes by the board of directors is absolutely ineffective as is also the approval of directors' minutes by the stockholders, save by way of indorsement or ratification of the directors' action recorded therein.

The minutes of a stockholders' annual or special meeting cannot be approved at a subsequent special meeting unless such approval is noted in the call and notice, but the minutes of any preceding stockholders' meetings, whether annual or special, may always be approved at the stockholders' annual meeting. Likewise the approval of the minutes of a directors' regular or special meeting at a subsequent special meeting is effective if such approval was duly notified as one of the purposes of the meeting, while any unapproved minutes of directors' meetings may always be approved at a regular meeting of directors.

The minutes of a stockholders' meeting are usually not passed upon until the following annual meeting, when all unapproved minutes should be read and, if no objections are offered, approved. Directors' minutes likewise are usually approved only at regular meetings. The approval of minutes relieves the secretary of all direct responsibility for the accuracy of their record and also serves as a ratification of the proceedings recorded therein.[1]

When minutes are approved, no record need be made save the statement in the minutes of the meeting then in progress that the minutes of the previous meeting or meetings, giving their dates, were read and approved. Usually, however, for convenience the secretary also notes at the bottom of each set of approved minutes the proper facts as "Approved at the annual meeting of stockholders held January 10, 1917."

If corrections of minutes are ordered, the minutes of the meeting then in session should show exactly what corrections were directed and in what minutes. In the corrected minutes the alteration should appear in red and a marginal note should give the date of the meeting at which such correction was directed. Red lines may be drawn through any part ordered stricken out and any correction be interlined, but no erasure should be made in any case, as the corrected minutes should show both the error and the correction.

Sometimes it happens that those present at a meeting decide, contrary to the facts, that the secretary has made errors in his record of a preceding meeting, and move that a portion of the minutes be stricken out or corrected. Whether right or wrong, if the majority of those present at the meeting vote in favor of the motion, the secretary must carry it into effect. In such case he should draw red lines through the part ordered stricken out and interline in red any matter

[1] Delano v. Trustees, 138 Mass. 63 (1884); County Court v. Ry. Co., 35 Fed. Rep. 161 (1888).

ordered inserted, and make the proper entry in the margin of the minutes. This then shows the whole matter; that the record was made in one way, and was at a later date ordered changed. The minutes of the meeting at which such change was ordered should also give a complete statement of the matter.

§ 323. "Cut and Dried Minutes"

The annual meeting of stockholders is frequently held in a locality distant from the residence of the parties really in interest, as for instance the meetings of the non-resident corporations of New Jersey, Maine, and many other states, which must be held within the state of incorporation. Also there are many corporations in which the whole or the greater part of the stock is held by combinations and the subordinate corporations hold only such meetings as are essential to maintain their legal existence. In these and in many other cases the only necessity for meetings is to give the proper legal expression to matters that are already determined, and it is possible to write out the entire minutes in advance.

The proceedings at such meetings are simple. A controlling interest, usually in the shape of proxies, is sent or taken to the place of meeting. If the regular officers are not present or are not authorized to act, officials for the meeting are appointed at the time by those holding these proxies. The prepared minutes are then read and agreed to, the meeting is adjourned, and the accepted minutes, signed by the officials who acted at the meeting, are returned to the secretary of the company and preserved in his minute book.

Part X—The Treasurer

CHAPTER XLIII

DUTIES AND POWERS OF THE TREASURER

§ 324. General

The duties, powers, and liabilities of the treasurer as one of the officers and directors of the corporation will be found in earlier chapters dealing generally with the duties and liabilities of the officers and directors. The present chapter and those following deal with those duties and liabilities which belong more particularly to the office of treasurer alone.

§ 325. The Treasurer's Primary Duty

The treasurer is the official custodian of the corporate funds,[1] and his primary duty is to receive them, care for them, and disburse them. Other duties assigned to him are usually in some way connected with, or related to, this primary duty.

§ 326. The Treasurer's Authority

The by-laws are almost invariably the source from which come both the powers and the duties of the treasurer. Statutes rarely specify his duties. In New Jersey, Pennsylvania, and a few other states the treasurer is required by statute to give a bond, and in Pennsylvania the treasurer must keep the moneys of the corporation in a separate book account to his credit as treasurer; but, broadly speaking, the whole matter of the treasurer's duties is left to the discretion of the cor-

[1] Laurel Springs Land Co. v. Fougeray, 57 N. J. Eq. 318 (1898).

poration. In New York, New Jersey, and some other states where the statutes permit special charter provisions, the treasurer's duties may be specified therein, but such regulations properly belong in the by-laws and are almost invariably found there.

In the care and management of the corporate funds and for the discharge of any duties connected therewith, the treasurer is the active agent of the corporation, and of its governing body, the board of directors. He is therefore subject to the direction of this board in all such matters, except in so far as his powers and duties have already been prescribed by higher authority.

If no provision as to the powers and duties of the treasurer are found in the charter or by-laws of the corporation, the directors, as an incident of their general control of the corporate affairs, are fully competent to determine these powers and duties and to authorize him to do whatever is required.

The treasurer is expected to inform himself as to the powers and duties pertaining to his office and must look for his authority, first, in the charter and by-laws, and second, in the resolutions of the board of directors.

§ 327. By-Law Provisions

By-law provisions relating to the treasurer differ in each corporation, but the following by-law extract presents an excellent synopsis of the usual duties of the treasurer:

> Section 5. *The Treasurer*
>
> The Treasurer shall have the custody of and be responsible for all moneys and securities of the Company; shall keep full and accurate records and accounts in books belonging to the Company, showing the transactions of the Company, its accounts, liabilities, and financial conditon, and shall see that all expenditures are

duly authorized and are evidenced by proper receipts and vouchers. He shall deposit, in the name of the Company, in such depositary or depositaries as are approved by the Directors, all moneys that may come into his hands for the Company account. His books and accounts shall be open at all times during business hours to the inspection of any Director of the Company.

The Treasurer shall also indorse for collection or deposit all bills, notes, checks, and other negotiable instruments of the Company; shall pay out money as may be necessary in the transactions of the Company, either by special or general direction of the Board of Directors, and on checks signed by the President and himself, and shall generally, together with the President, have supervision of the finances of the Company.

He shall also make a full report of the financial condition of the Company for the annual meeting of the stockholders, and shall make such other reports and statements as may be required of him by the Board of Directors or by the laws of the State.

He shall give bond in the sum of five thousand dollars, with sureties satisfactory to the Board of Directors, for the faithful performance of his duties and for the restoration to the Company, in event of his death, resignation, or removal from office, of all books, papers, vouchers, money and other property belonging to the Company that may have come into his custody. He shall receive such compensation, not exceeding eighteen hundred dollars per annum, as may be fixed by the Board of Directors.

By these provisions the treasurer is given entire custody and charge of the corporate moneys and securities, though not of the general property belonging to the company. These provisions could be extended to cover other property, if desired.

In the by-laws of the larger corporations it is usually though not invariably the case that the powers and duties of the treasurer are specified in much detail. The following provision, defining the powers and duties of the treasurer, is

taken from the by-laws of the United States Steel Corporation:

> Section 7. *Powers and Duties of Treasurer.* The treasurer shall have custody of all the funds and securities of the Company which may have come into his hands; when necessary or proper he shall indorse on behalf of the Company, for collection, checks, notes, and other obligations, and shall deposit the same to the credit of the Company in such bank or banks or depositary as the Board of Directors or the Finance Committee may designate; he shall sign all receipts and vouchers for payments made to the Company; jointly with such other officer as may be designated by the Finance Committee, he shall sign all checks made by the Company, and shall pay out and dispose of the same under the direction of the Board or of the Finance Committee; he shall sign with the president, or such other person or persons as may be designated for the purpose by the Board of Directors or the Finance Committee, all bills of exchange and promissory notes of the Company; he may sign, with the president or a vice-president, all certificates of shares in the capital stock; whenever required by the Board of Directors or by the Finance Committee, he shall render a statement of his cash account; he shall enter regularly, in books of the Company, to be kept by him for the purpose, full and accurate account of all moneys received and paid by him on account of the Company; he shall, at all reasonable times, exhibit his books and accounts to any director of the Company upon application at the office of the Company during business hours; and he shall perform all acts incident to the position of treasurer, subject to the control of the Board of Directors or of the Finance Committee.
>
> He shall give a bond for the faithful discharge of his duties in such sum as the Board of Directors or the Finance Committee may require.

As will be noted, the treasurer is subordinated to the board of directors and to the finance committee. In the present in-

stance he is still further held in check by another by-law provision subjecting him to removal without cause at the pleasure of the directors. Under such circumstances, it is not probable that the treasurer will lightly oppose the wishes or instructions of the directors.

In the same by-laws, Article V, Section 8, provision is made for assistant treasurers as follows:

> "Section 8. *Assistant Treasurers.* The Board of Directors or the Finance Committee may appoint an assistant treasurer or more than one assistant treasurer. Each assistant treasurer shall have such powers and shall perform such duties as may be assigned to him by the Board of Directors, or by the Finance Committee."

The by-law provisions relating to the treasurer are simpler in the smaller corporations. The following are usual provisions:

> *The Treasurer* shall have the custody of all moneys and securities of the Company, and shall keep regular books of account and balance the same each month. He shall sign or countersign such instruments as require his signature, and shall perform all other duties incident to his office or that are properly required of him by the Board of Directors.
>
> *The Moneys* of the Company shall be deposited in the name of the Company in such bank or trust company as the Board of Directors shall designate, and shall be drawn only by check signed by the Treasurer and countersigned by the President of the Company.

§ 328. Director's Resolutions

The directors ordinarily cannot change the provisions of the by-laws as to the powers and duties of the treasurer; but they are generally required, as in the examples of by-laws given in the preceding section, to supplement them by designating the depositary of the corporate funds, and by prescribing

any other working details which may be necessary and do not conflict with the by-law provisions.

In a few states the directors either have power under the statute to make and alter the by-laws, or may be given such power in the certificate of incorporation itself. When this is the case the directors are enabled thereby to exercise complete and unquestioned control over the corporate officials.

§ 329. Books of Account

The treasurer has, as a matter of course, charge of the corporate books of account. In the smaller corporations he is usually either acting bookkeeper or has direct control of the books of account and keeps his own special books as well. A knowledge of bookkeeping and of the financial duties connected with his office is then a necessary qualification. In the larger corporations the treasurer's duties do not usually include the details of accounting. These devolve upon subordinate employees, or are perhaps relegated to an accounting department, leaving the treasurer free to devote his attention to the general oversight and management of the corporate finances and financial affairs.

In many of the larger corporations the actual duties of the treasurer are nominal, the usual duties of that official being assigned to other officers or employees of the corporation. The treasurer is then, as a rule, selected because of his financial responsibility or connections, or for other reasons that make his election desirable.

§ 330. Assumption of Official Duties

The procedure and formalities when the newly elected treasurer assumes the duties of his office are simple. Usually he is required to give bond, and this must be done in accordance with the requirements of the particular corporation before he may enter upon the duties of his office. As soon, how-

ever, as he has qualified for his position by giving a satisfactory bond and complying with any other requirements of the corporation, he is ready and entitled to take possession of his office and begin the discharge of his official duties.

The retiring treasurer, on the other hand, retains his position as treasurer of the corporation and has authority to perform all its usual duties until the treasurer-elect has qualified and assumed the duties of his office. Then, however, the authority of the retiring treasurer immediately terminates, he is no longer competent to exercise any of the functions of the office, and, unless otherwise instructed by the board, must at once turn over to the new official all corporate property in his custody, including the books of account.

The retiring treasurer, in preparation for the surrender of his office, usually closes his books and prepares a balance sheet, giving a more or less complete statement of the general financial condition of the corporation. Also an audit of his accounts is customary and desirable, particularly when the corporate assets are material.

The audit of the retiring treasurer's books relieves the incoming treasurer from any responsibility as to their condition. He takes them as they are, but must assure himself that the corporate funds and other property turned over to him by the retiring treasurer accord with the books. If he does not, his negligence in the matter may render him liable for any resulting loss to the corporation.

The incoming treasurer should at once notify the depositories in which the corporate funds are held of his election and assumption of office. If the corporate funds have been deposited in the name of the treasurer of the corporation, it will be necessary for them to be transferred to the treasurer-elect by check of the retiring official. If, however, the funds are deposited in the corporate name, no such transfer is necessary. There is then no change in their ownership but merely

a change in the officer by whom checks are drawn, and proper certification to the bank of this change is all that is required. (See Form 171.) Should the outgoing treasurer refuse to turn over to the treasurer-elect any property which belongs to the corporation, the directors, or even the treasurer himself, may bring suit for its recovery. As a matter of course, the treasurer should give his predecessor a receipt for the corporate property turned over.

§ 331. Formalities on Giving Up Office

When the treasurer relinquishes, or is ousted from, his position, all properties of the company in his possession, including the books of account, should be surrendered to his successor or to such other party as may be designated by the board of directors. The incoming treasurer is the usual and proper party to whom such property is delivered. The retiring treasurer should be given receipts for all properties turned over.

The corporate accounts are always the property of the corporation. Sometimes in the smaller corporations the books in which these accounts are kept have been purchased by the treasurer personally and the question as to their ownership then arises. As a matter of law, the treasurer must surrender the books in which the accounts are kept although these books have been purchased with his personal funds. He is entitled in such case to payment for the books but he cannot withhold them as a means of enforcing this payment or on the plea that they are his.[2]

In order to prevent any complications on this score, it is sometimes provided in the by-laws that the accounts of the company shall be kept only in books that are the property of the corporation.

[2] State v. Goll, 32 N. J. L. 285 (1867); High on Extraordinary Legal Remedies, § 306.

CHAPTER XLIV

RELATION OF TREASURER TO OTHER CORPORATE AUTHORITIES

§ 332. To the Stockholders

The treasurer is the agent of the corporation but under the usual corporate arrangements his direct responsibility is to the board of directors, not to the stockholders. In practice the treasurer usually has no official connection with the stockholders, save perhaps when an annual or an occasional special report is to be made, when dividends are to be paid, or amounts due from the stockholders to the corporation are to be collected. He is not under their supervision and owes them no direct duty. He must obey their instructions as expressed in the by-laws of the corporation but this is the limit of their usual authority. Should they attempt to compel his action by direct motion or resolution, they exceed their power and the treasurer is under no legal obligation to obey.

As stated in an early case, "The individual members of the corporation, whether they should all join, or each act separately, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent or servant to account, or discharge them from any liability."[1]

§ 333. To the Board of Directors

Speaking generally, the treasurer is directly responsible to the directors and must obey their instructions. Occasionally, however, the charter gives him certain specified powers and

[1] Smith v. Hurd, 12 Metc. (Mass). 371, 385 (1847).

almost invariably the by-laws define his authority and prescribe his duties in detail. It is then beyond the power of the directors to disturb him in the exercise of the authority and the performance of the duties prescribed by these higher corporate authorities.

For instance, the charter may provide that the treasurer shall be ex officio, a member of the finance committee. If so, the directors cannot deny him this right as long as the charter provision remains unchanged. Or the by-laws may, as is usual, assign the custody of the corporate funds to the treasurer. Should the directors, in defiance of this by-law provision, instruct the treasurer to surrender the corporate funds to the custody of some other officer of the company, they would, save perhaps in case of some special emergency, exceed their authority and the treasurer need not obey their instructions. On the contrary, should he obey them and should loss result to the company as a consequence, the treasurer himself might be held responsible.

The treasurer must, however, obey all such proper instructions of the directors as are not in conflict with charter or by-law provisions, or are intended to supplement and make them effective. In all such matters the directors are entirely within the scope of their powers and their instructions are as binding upon the treasurer as are the by-laws themselves.

Sometimes also the directors are given express authority to modify, repeal, or amend the by-laws, and their power over the official acts of the treasurer is then practically complete. When this is the case, statutory and charter provisions alone are superior to their authority.

It may be added, however, that the powers discussed are the powers of the board of directors and not of the individual directors composing the board. These individual directors have certain powers of their own. Thus, without special authorization thereto, any member of the board of directors

may inspect the corporate books at any reasonable time—save for purposes hostile to the corporation[2]—and may examine at his discretion into the acts of the treasurer or of any other corporate official, though he cannot delegate this official right to an audit company.[3] Also as an individual director, he may make such suggestions to the corporate officials as he sees fit and such suggestions will naturally have weight.

The individual director has not, however, any power to enforce compliance with his suggestions, nor has he the right to change, censure, suspend, remove, or even direct an officer of the corporation, such rights and powers inhering only in the board collectively. A director may be specially authorized by the board to do any of these things and will then have all necessary power for its performance, but he has no such authority by mere virtue of his board membership.

The treasurer reports to the directors and, as already stated, is governed by their instructions in all matters not specifically covered by charter or by-law provisions. The relations between the treasurer and the board of directors are therefore very close and are usually harmonious. Both are supposed to have the financial welfare of the corporation at heart and to be working together to advance it, and it is but rarely that the exact measure of the board's authority over the treasurer, or of the treasurer's independence of the board, comes into question.

§ 334. To the Finance Committee

Nominally the finance committee is subject to the board of directors. It is, however, always composed of members of the board and generally of its best financiers, and the directors are usually and wisely quite content to leave the financial

[2] Heminway v. Heminway, 58 Conn. 443 (1890); People v. Central Fish Co., 117 App. Div. (N. Y.) 77 (1907).

[3] People v. Borgstede, 169 App. Div. (N. Y.) 421 (1915); People v. Throop, 12 Wend. (N. Y.) 183 (1834).

management of the corporation entirely in its hands. The finance committee is then practically the board of directors so far as the finances of the corporation are concerned. The committee will naturally report to the directors at frequent intervals, but its reports, acts, and recommendations are usually sure of approval in advance. In practice, a finance committee possessing the confidence of the board will direct the financial affairs of the corporation from year's end to year's end without interference. The allegiance, co-operation, and obedience the treasurer ordinarily owes to the directors is then transferred to this committee.

If the treasurer is a member of the board of directors, he is usually also a member, ex officio, of the finance committee and participates in its proceedings. If, however, he is not a director, he cannot be made an active member of the committee. This is, as already stated, because the committee exercises discretionary powers belonging to the board, which cannot be legally conferred upon a committee composed in whole or in part of members who are not directors.

If the treasurer is a member of the finance committee, and particularly if he is of some financial ability and standing himself, the direct and entire charge of the financial affairs of the corporation is apt to be left in his hands, the remainder of the committee acting merely in an advisory capacity. Even where the treasurer is not a member of the committee, the financial matters of the corporation are still as a rule left largely to his care. In such case he reports frequently and informally to the committee, either receiving authority for the particular act or policy under discussion, or approval of his actions in matters which have already been consummated.

When the treasurer has not sufficient experience and ability to conduct the general financial affairs of the company to this extent, he works in close accord with the members of the finance committee, carrying out their instructions, con-

sulting with them frequently, and at all times referring to them matters of importance, or such as may be beyond his immediate authority, ability, or control.

Since the finance committee practically takes the place of the board of directors as far as the corporate finances are concerned, it usually and naturally has all the authority of the board itself over the treasurer. The matter is, however, one that may be determined absolutely by the charter or by-laws. These usually and properly prescribe that the treasurer shall report to, and be controlled by, the finance committee.

The following by-law provisions define with much clearness the usual scope and powers of the finance committee and its authority over the treasurer. They are found under the head of "Standing Committees" in the by-laws quoted from in the preceding chapter:

> The Finance Committee shall have general and special charge and control of all financial affairs of the Company, and shall have and exercise all of the powers of the Board of Directors in such financial matters when the latter is not in session. The Treasurer and the Auditor of the Company shall be under the direct control and supervision of the Finance Committee.
>
> The Finance Committee shall fix all salaries and compensation paid or payable to officials of the Company, except as otherwise provided in these by-laws or fixed by resolution of the Board of Directors.

It will be noted that the financial affairs of the company are placed unreservedly in the hands of the committee in the interim between board meetings; also that the treasurer is expressly subordinated to its authority.

The general relation between the finance committee and the treasurer should be that of harmonious and effective co-operation. Both are working to the same end, i.e., the best possible administration of the financial affairs of the corporation, and there should be no conflict or friction between them.

§ 335. To the Auditor

In the smaller corporations the auditor is merely an occasional officer called in for the purpose of investigating and passing upon the treasurer's accounts. In such case his relation to the treasurer is temporary and needs no special discussion. The treasurer's books are opened to the auditor, who examines them, checks up their statements, and reports his finding to the board. The treasurer will, naturally, furnish any proper information and assistance required by the auditor in the course of this examination and will facilitate his work in every way.

In the larger corporations, however, the conditions are materially different. Here the auditor, or comptroller as he is sometimes designated, is one of the regular officials of the corporation and his duties and the relations existing between him and the treasurer depend entirely upon the respective duties of the two officials. These are usually set forth in the by-laws and vary in different corporations.

In the larger corporations the auditor is the accounting officer, taking entire charge of the general bookkeeping. The actual receipt, custody, and disbursement of the funds and their general management remain with the treasurer. Detailed records of these receipts and disbursements as well as the general accounts of the corporation are kept in the auditor's department, the treasurer's records also covering these items but in a less detailed way.

In some corporations, accounts to be paid are authorized by the auditor, are approved perhaps by some other officer, and the actual payment is made by the treasurer. In other cases the payments are for all practical purposes made by the auditor; vouchers, duly signed and countersigned, being sent out to the parties to whom payments are due, and these vouchers being payable on presentation to some designated bank which acts for the treasurer. Or again, the voucher will be pre-

pared or passed upon by the auditor and perhaps by the official in whose department the obligation arises, and this voucher when signed by the treasurer becomes a check, honored upon presentation at a designated bank.

The whole matter is one of adjustment, varying, as stated, in different corporations. In any case the auditor and the treasurer usually have distinct departments, and, while their accounts overlap in some measure as to cash received and disbursed, there is but little room for conflict between them. Each is independent of the other and exercises functions that should be distinct and so clearly defined that clashing is impossible.

§ 336. To the Other Officials

The three essential executive officers of the corporation are the president, the secretary, and the treasurer. In the usual corporate organization the president is the superior officer of the three, and is usually given certain powers of supervision over the other two.

The secretary and treasurer are entirely independent of each other. Also their respective functions are so distinct that friction between them is unusual and absolutely unnecessary. In the smaller corporations the two offices are frequently and advantageously united in the same person.

Between the president and the treasurer the probability of friction is much greater. The president, as already stated, is usually given certain general powers of supervision over the other corporate officers, and, as these powers are rarely defined with clearness, there is at times room for real difference of opinion as to their limits.

Under the usual by-law provisions the president has the right to inspect and examine the books, accounts, and records of the treasurer at any reasonable time.[4] He has, however,

[4] People, etc. v. Goldstein, 37 App. Div. (N. Y.) 550 (1899).

no right to interfere directly with the treasurer's actions unless he sees some actual neglect or improper performance of duty. In any such case it is his duty to call the matter to the treasurer's attention. If the latter is obviously at fault, it is his duty to heed the president's instructions. If, however, there is a difference of opinion between the two officials as to whether or not the treasurer is at fault, the president, unless specially empowered, cannot enforce his views directly. All he can do is to report the matter to the directors, and both officers will then be governed by the directors' decision.

As the president is the chief executive officer of the corporation, the treasurer is naturally expected to confer with him on matters of unusual importance or difficulty and to be guided to a greater or less extent by his opinions and suggestions. The president, however, as stated, cannot himself force the treasurer to heed his instructions unless he has been given some special power in the matter by charter or by-law provisions, or by action of the board of directors.

The offices of president and treasurer are occasionally united in one person but not commonly, as the respective duties of the two positions are apt to conflict. Thus, in some states the statutes require the signature of both the president and treasurer to certificates of stock, and the by-laws commonly prescribe a similar signature for the corporate checks and other instruments. It is obvious that the whole purpose of these precautionary measures would be defeated if the two offices were combined.

CHAPTER XLV

THE TREASURER'S LIABILITIES

§ 337. The Treasurer as Agent

The treasurer's duty in regard to the moneys and the property of the corporation entrusted to his care, is that of an agent, and he is held to the same measure of accountability. In an early New York case it was expressed as follows: "The duty of a treasurer is to keep the moneys of his principal distinct from his own, and to be ready at all times to pay over what balance he owes to his principal." With sage recognition of the fact that readiness to perform is not performance, the learned judge continues, "and to pay the balance on demand."[1]

In his duties outside those relating directly to the custody of the corporate funds and property, the treasurer is likewise acting as an agent and employee of the corporation and is liable to it if he fails in the proper performance of these duties as is any other agent or employee.

§ 338. To Whom Liable

When liability is incurred by the treasurer in connection with the duties of his office, it is usually to the corporation though it may be to the individual stockholders of the corporation, or even to individuals outside the corporation. Beyond this there is in some states a civil liability for the nonperformance of certain duties prescribed by statute, and in all states there is a criminal liability for acts in violation of the penal statutes.

[1] Second Ave. R. R. Co. v. Coleman, 24 Barb. 300 (1857); Hunter v. Robbins, 117 Fed. Rep. 920 (1902).

Thus, if the treasurer loses a portion of the company funds through careless handling, he is responsible to the corporation. If he makes an official report to the stockholders which is false in some material respect and the stockholders act upon this false information and lose money thereby, the treasurer is personally liable to the individual stockholders by whom these losses are incurred. Or if he misrepresents the financial status and ability of the corporation to an outsider in order to induce him to give credit to the company, he is liable to such outsider for any losses incurred as a result of his false representations. In many states if he fails to make certain specified reports, he is liable to fine. In all states, if he embezzles the corporate funds or uses his official position to defraud, he is subject to a criminal prosecution.

§ 339. Sources of Liability

Speaking generally, the treasurer may be liable for failure to perform, or for the improper performance of the duties of his office, as follows:

1. Neglect of or non-performance of duties
2. Faulty performance of duties
3. Unauthorized acts
4. Illegal acts

§ 340. (1) Neglect of or Non-Performance of Duties

As a rule, the treasurer is liable for any loss or damage incurred through his neglect of or failure to perform his duties. Thus, if he fails to deposit the corporate funds in due time, or in accordance with the requirements of the by-laws or the directors, and because of this neglect they are burned, stolen, or otherwise lost, the treasurer is responsible to the corporation. Or if money is due and the treasurer does not take the necessary steps for its collection, and as a result it is lost to the corporation, he is again responsible. Or if he refuses

to perform his proper duties and the corporation is involved in losses thereby, he is responsible to the corporation for the amount so lost.

In any case of loss to the corporation because of neglect of duty on the part of the treasurer, the measure of his liability is usually the amount actually lost, or the damage actually sustained in consequence of such failure or non-performance. He cannot ordinarily be held liable for losses indirectly due to his failure.

It is to be noted that the liability of the treasurer for neglect or non-performance of his duty is to the corporation and not to the individual stockholders. Any action, therefore, against the treasurer for losses incurred by reason of his neglect or failure must be instituted by the board of directors, and not by the stockholders, either as a body or individually.

In the larger corporations and wherever the value of the corporate funds and property in the treasurer's hands is material, it is usual to require him to give bond for the faithful performance of his duties. This bond, if good and of sufficient amount, will usually cover any losses occasioned by the failure or the misdeeds of the treasurer and be an efficient protection to the corporation. (See Chapter XLVI, "The Treasurer's Bond.")

§ 341. (2) Faulty Performance of Duties

The treasurer may render himself liable for faulty performance of his duties as well as by neglect of these duties, and in such case his liability may be to outside parties or to the corporation. For instance, if the treasurer signs a note of the corporation, and, instead of using the proper corporate signature, signs his own name followed by the term "Treasurer," he will in some states and under some circumstances make himself liable as a principal, although he had no inten-

tion of so doing and was not expected to be personally involved.[2]

So also, if the treasurer in paying some corporate indebtedness, carelessly draws a check for a larger amount than is required and the excess cannot be recovered from the payee the treasurer is liable to the corporation for its amount.

The liability of the treasurer from faulty performance of duty seldom arises. His position is one of trust and responsibility and the incumbent is usually experienced in business matters and accustomed to the handling of funds. Under these circumstances it is hardly to be expected that he will err so grossly in any of his official acts as to subject himself to liability.

§ 342. (3) Unauthorized Acts

The treasurer is the agent of the corporation and within the scope of his authority can act for and bind it. If, however, he acts beyond the scope of his usual duties, not being authorized thereto, his act is without validity and the corporation is not necessarily bound.[3] Also in any case of loss resulting from his unauthorized acts he is liable in damages to the party suffering such loss, whether it be the corporation or an individual. This is the usual liability of an agent exceeding his authority.[4]

For instance, if the treasurer of a corporation, not being authorized thereto, orders a costly piece of machinery for the use of his company, the corporation may lawfully refuse to receive it even though the order was accepted by the manufacturer on the supposition that the treasurer had been duly empowered to make the purchase. In such case the maker of

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[2] Merchants Nat. Bank v. Clark *et al.*, 139 N. Y. 314 (1893); First Nat. Bk. v. Wallis, 150 N. Y. 455 (1896).

[3] Daniele v. Burlington, etc., Co., 84 N. J. Eq. 53 (1914); Jacobus v. Jamestown Mantel Co., 211 N. Y. 154 (1914).

[4] Kroeger v. Pitcairn, 101 Pa. St. 311 (1882); Baltzen *et al.* v. Nicholay, 53 N. Y. 467 (1873); Taylor v. Nostrand, 134 N. Y. 108 (1892).

the machinery is the injured party and may hold the treasurer personally responsible for any real loss involved in the transaction.

Or should the treasurer, not being authorized thereto, enter into a contract on behalf of the corporation to supply certain goods at a low price, the corporation is not bound by his agreement unless it ratifies his act, and, if it does not, the treasurer is liable to the other party for any direct loss.

If, however, the treasurer, though really unauthorized thereto, performs some act within the apparent scope of his powers, that is an act within the powers usually incident to his office,[5] or powers which he has been represented to the public as possessing,[6] and the party with whom he deals is unaware of the treasurer's lack of authority, the corporation is bound by the act. If any loss results, the treasurer is liable to the corporation. For instance, if the treasurer, having neither express nor implied authority therefor, or perhaps acting contrary to the instructions of the board, enters into a contract with a banking house to discount a large amount of the corporation paper at such an unfavorable time or under such conditions as to involve a loss, and the banking house supposed the treasurer to have authority to make such contract, the corporation cannot repudiate the treasurer's action as unauthorized.[7] On the contrary, it must abide by the terms of the agreement and its only recourse is against the treasurer and the measure of its damages is the loss actually involved.

The treasurer's general liability for unauthorized actions is well expressed in the following quotations: "It is the first duty of an agent, whose authority is limited, to adhere faithfully to his instructions, in all cases to which they can be properly applied. If he exceeds or violates or neglects them, he is

[5] Traitel Marble Co. v. Brown Bros., 150 App. Div. (N. Y.) 485, 487 (1913).
[6] Culver v. Pocono, etc., Ice Co., 206 Pa. St. 481 (1903).
[7] Austrian & Co. v. Springer, 94 Mich. 343 (1892); Brown v. Franklin Mut. Fire Ins. Co., 165 Mass. 565 (1896).

responsible for all losses which are the natural consequences of his act."[8] "The cases in which agents have been adjudged liable personally have sometimes been classified as follows, viz.: first, where the agent makes a false representation of his authority with intent to deceive; second, where with knowledge of his want of authority but without intending any fraud, he assumes to act as though he were fully authorized; and third, where he undertakes to act, bona fide believing he has authority, but in fact has none, as in the case of an agent acting under a forged power of attorney. As to cases fairly brought within either of the first two classes there cannot be any doubt as to the personal liability of the self-constituted agent, and his liability may be enforced either by an action on the case for deceit, or by electing to treat him as principal. While the liability of agents in cases belonging to the third class, has sometimes been doubted, the weight of authority appears to be that they are also liable."[9]

The treasurer may be liable for wrongfully paid dividends. (See § 379.)

§ 343. (4) Illegal Acts

The illegal acts of which the treasurer is most commonly guilty may be divided into two classes: (1) fraudulent acts, such as false or misleading statements or reports as to the property or financial condition of the corporation made or certified to by him; (2) criminal acts, such as embezzlement of the funds entrusted to his charge.

Offenses of the first class are not infrequent and may be offenses against individuals, or against the state. In case of misrepresentation to individuals, the treasurer is liable to the parties misled as is any agent [10] and may subject himself to a

[8] Whitney v. Merchants' Express Co., 104 Mass. 152, 154 (1870); see also Wilts v. Morrell, 66 Barb. (N. Y.) 511 (1873); Taylor v. Nostrand, 134 N. Y. 108 (1892).
[9] Kroeger v. Pitcairn, 101 Pa. St. 311, 317 (1882).
[10] Morgan v. Skiddy, 62 N. Y. 319, 326 (1875); Kroeger v. Pitcairn, 101 Pa. St. 311, 317 (1882).

criminal liability as well. In case of false representations to the state, he is subject to special penalties provided by the statutes.

False or fraudulent reports are prohibited by the laws of almost every state in the Union. Varying punishments are imposed. Usually the statutes provide that a treasurer making or concurring in any representation materially false in any of its details, shall be liable to any individual damaged thereby to the amount of his loss. Frequently a further and more serious penalty is imposed, consisting of both fine and imprisonment.

The criminal acts of the treasurer may be of two classes: (1) those inuring to his direct personal benefit, such as embezzlement of the corporate funds or obtaining money under false pretenses from the corporation, or from those with whom the corporation is transacting business; (2) participation in acts of the corporation that would in an individual be criminal.

The liability of the treasurer for criminal acts inuring to his personal benefit are the same as for any other individual. Such offenses are neither better nor worse, nor does their punishment differ when committed by a corporation official.

If criminal acts are committed by the corporation, the treasurer or any other officer responsible therefor, or knowingly assisting or concurring therein, is liable to prosecution and punishment.[11] In such case it must be shown, however, that "the corporation did them by his hand, act, direction or permission, which of course is direct proof of his own acts, or such circumstances must be shown as to justify the conclusion, as a fact, that what the corporation did, he did."[12] In other words, he is an agent with an agent's usual liability but no more.

Thus if the corporation obtains credit or moneys by means

[11] Weber v. Weber, 47 Mich. 569 (1882); Hubbard v. Weare, 79 Iowa 678 (1890.; Vreeland v. N. J. Stone Co., 29 N. J. Eq. 188 (1878).
[12] People v. England, 27 Hun 139 (1882).

of false representations, i.e., under false pretenses, in order to hold the treasurer responsible, either civilly or criminally, it must be shown that he participated in such act or knowingly allowed it to be done.[13] As a corporation cannot be held criminally liable, and as it is far more difficult to secure the criminal conviction of its officials than to enforce a civil liability, criminal prosecutions against the treasurer in cases of the kind are exceedingly rare. Civil prosecutions are not so uncommon and, if his participation and responsibility can be proved, he is held.

Outside of false representations, acts involving criminal liability are not often committed under corporate direction. Sometimes, however, they do occur, as where the agents of a corporation resort to violence or the destruction of property in order to hinder or prevent the success of a rival concern. In any such case the corporation itself can naturally be held only in damages, but the agents, by whom the criminal act is performed, are liable to punishment as if the act were their own deed, instigated and committed by them alone.

§ 344. Statutory Liabilities

In many of the states the liabilities discussed in the present chapter, which in the main are common law liabilities, have been further enacted into statutory liabilities. Also in some cases specific additional penalties have been added. An instance of this has already been given in the case of false reports, where the treasurer is not only liable to the individuals injured by such false reports, but is subject to a prescribed statutory penalty as well, this penalty usually including both fine and imprisonment.

In addition to the common law liabilities, there are in some states penalties for refusal to allow the proper inspection

[13] Wakeman v. Dalley, 51 N. Y. 27 (1872); Arthur v. Griswold, 55 N. Y. 400 (1874); Morgan v. Skiddy, 62 N. Y. 319 (1875).

of books; for failure to make certain reports; for permitting stockholders to withdraw any part of their investment in the corporation and for allowing other impairments of the capital stock. Most of the things thus penalized are in themselves morally indefensible.

It will be found, however, that occasionally acts or omissions entirely innocent in themselves have, by direct statutory provision, been made punishable offenses. Thus in some states the omission to file certain prescribed reports at a particular time is punished by fine. Statutory provisions of this kind are, however, not numerous and, as far as applicable to the treasurer of the corporation, are restricted almost entirely to the corporate reports.

CHAPTER XLVI

THE TREASURER'S BOND

§ 345. General

The corporate funds are usually placed in the treasurer's care with but little reservation, and, in the absence of special protective provisions, the measure of their safety is the integrity and efficiency of the treasurer. If he is dishonest, they may be stolen; if he is careless, they may be lost.

The safeguards that can be thrown round the corporate funds while in the treasurer's custody are but few. Usually he is required to deposit them as soon as they come into his hands, and their withdrawal may be effected only by check signed and countersigned as required by charter, by-laws, or directors' resolution. Notes and drafts likewise usually require signature and countersignature. Regulations as to corporate loans, discounts, and other financial transactions restrict his power. Audits of the treasurer's books are held from time to time. His character, standing, and financial responsibility always have much weight.

It is obvious, however, that all this affords but very partial protection to the corporate funds, and still less to the other property entrusted to the treasurer's care. One further protective measure of importance exists, and this is the treasurer's bond, the most effective and most relied upon of all the material safeguards possible.

The treasurer's bond is an instrument whereby the parties signing it bind themselves within the limits of the bond to make good any losses the corporation may suffer from the dishonest acts or wilful omissions of the treasurer. The obligations of the bond are governed strictly by its terms, but the

usual personal bond requires: (1) the faithful performance of the treasurer's duties; (2) the safety of the corporate funds and other property entrusted to his care; and (3) their due return on the expiration of his term of office, or at any prior time upon legal demand.

§ 346. Statutory Requirements

In many states the statutes are silent on the subject of the treasurer's bond. In a few states, notably New Jersey and Pennsylvania, the statutes require that the treasurer be bonded in such sum and with such sureties as the by-laws provide. In other states, as in New York, Colorado, Delaware, Massachusetts and Illinois, the statutes are merely permissive and provide that security may be demanded of the treasurer. As to the stockholders, this is merely a restatement of a power already existing. They may, if they wish, provide in the by-laws that a bond shall be required of the treasurer, but they might do this with equal force if the statutes were silent. As to the directors, however, such statutes are of greater weight, giving them, in the silence of the by-laws, the unquestioned right to require a bond from the treasurer—a power which otherwise is doubtful. The statutes of the states mentioned are not, however, mandatory, and, if the directors see fit, they may omit the requirement and cannot be held liable in case of resulting loss to the corporation.

§ 347. Corporate Requirements

Irrespective of any statutory provision, the stockholders have full power at common law to require the treasurer to give a bond. Such a requirement might be, and sometimes is, incorporated in the charter, but is usually found in the by-laws.

When the by-laws require a bond, they will sometimes specify its amount and the number of sureties, or perhaps pro-

vide instead that the bond of a reputable surety company shall be given. Usually, however, they merely direct that a bond shall be required of such amount and with such sureties as the board of directors may prescribe. Frequently they are merely permissive, stating that the board may require the treasurer to give a bond, all details being left to the board.

In all cases where the by-laws require a bond of the treasurer, the directors have full power to prescribe any details not covered by the by-law provision. Should neither the statutes nor the charter or by-laws of the corporation require such bond, it is doubtful whether the board would of its own authority have power to compel it.

§ 348. Nature of the Bond

The treasurer's bond is a formal undertaking of certain parties who are specified therein and by whom the bond is signed, that in the event of loss arising from the defalcation or other dishonesty of the treasurer, they will make good such loss up to the amount of their bond. When such a bond is given, it is usually signed by the treasurer and by his bondsmen as well, and in all cases the details of the liability involved are set forth in full in the instrument.

Formerly personal bonds were the rule and the bondsmen were usually friends of the bonded official. Of recent years, however, responsible surety companies supply bonds of the kind, and the personal or individual bond has been largely superseded.

The personal bond is generally sweeping in its nature, covering any loss occasioned by defalcation or dishonesty on the part of the treasurer and also providing for the proper restoration to the company, when legally demanded, or at the expiration of the treasurer's term of office, of all moneys, papers, vouchers, documents, books of account, and other property belonging to the company then in his hands.

The wording of the bond will, however, affect and directly limit the extent of the sureties' liability. Usually bondsmen are not held liable for accidents or mistakes of the principal, or for his inability to perform all the duties of his official position.[1] But where the condition of the bond provides that the principal shall perform all the duties of his office and that the sureties shall pay all damages or losses arising from any failure to perform such duties, the bondsmen may be held.[2]

§ 349. Amount of Bond

There is no rule as to the amount of the treasurer's bond. Manifestly the matter is one that must be governed by the conditions of each special case. Its amount is supposed to be proportionate to the risk involved, but frequently it will be fixed haphazard, or at some arbitrary amount deemed sufficient, or perhaps the cost of the bond will determine its amount. In all cases the bond should be adequate to cover any loss reasonably possible.

The treasurer of a corporation is usually a man of standing and character, and this will in itself have a direct bearing in fixing the amount of his bond. Also he is frequently of some financial responsibility and this will have weight, as the extent of the treasurer's liability is not limited by the amount of his bond. The bond is merely a crystallization of a portion of his liability in convenient shape for ready realization in case of loss for which he is responsible, and any property he may own is available beyond this in case the bond is insufficient. Also some measure of safety is insured by the usual checks existing or placed upon the treasurer's official actions, i.e., the general knowledge of the business and of the treasurer's accounts and affairs possessed by the directors and other cor-

[1] Morris, etc., Co. v. Administratrix, 21 N. J. L. 100 (1847); Union Bank v. Clossey, 10 Johns (N. Y.) 271 (1813); *contra*, Am. Bank v. Adams, 12 Pick. (Mass.) 303 (1831).

[2] Union Bank v. Thompson, 8 Rob. (La.) 227 (1844).

poration officials, the accounts required to be kept, the periodical audits, the prompt deposit of funds, the countersignatures to checks, notes, drafts, etc., etc.

All this must be taken into consideration as must also the general improbability that, in event of the treasurer's neglect or dishonesty, all the corporate funds and property in his possession will be lost. The bond is usually but a small proportion of the amount entrusted to the treasurer's care when this is at all considerable, and the ratio diminishes rapidly as the amount involved increases. For instance, the treasurer of some small corporation with a cash balance never exceeding a few thousand dollars, will frequently be required to give a bond for a thousand dollars or more. In this case the bond ranges from 25 to even 100 per cent of the total risk. In a large corporation the percentage would be relatively much smaller.

Frequently, as stated, the cost of bonding has some weight in determining its amount. Under the personal bond this element does not enter in, but with the surety company bond the cost increases with the size of the bond and its amount will naturally be kept as low as wise prudence will permit. Sometimes, with penny-wise economy, its amount is fixed still lower.

§ 350. Personal Bonds

As already stated, the bond formerly given by the treasurer was almost invariably signed by individuals. These individuals were usually friends of the treasurer who went on the bond merely as an accommodation to him and without expectation of compensation and equally without expectation of ever being called upon to meet its obligations. If, then, through the treasurer's fault or misfortune, losses occurred and these friends were called upon to make good the undertakings of the bond, they naturally felt the demand to be a hardship, as in truth it was. They were legally liable, but they did not feel the moral obligation of a just debt, and

would therefore delay payment as long as possible and frequently evade it altogether, or perhaps be found unable to pay. The whole system was, and is, unsatisfactory and ineffective.

The personal bond is still used to a considerable extent, and when it is employed the standing of the treasurer's sureties or bondsmen becomes a matter of the first importance. It is obvious that the value of the bond rests not alone in the financial ability of the bondsmen but to a considerable extent upon their moral responsibility as well, and both their financial standing and general character should therefore, when the bond is large, be subjected to a searching scrutiny. This is a matter entirely within the province of the directors. Usually the bondsmen of a corporation treasurer are personally known to the directors, and the desirability of these bondsmen may then be decided from knowledge so gained without the necessity of special investigation.

It need hardly be said that the actual drafting of the instrument by which the treasurer's bondsmen are held should be careful and competent. A defective instrument might easily result in a total loss of the protection the bond was expressly intended to afford. (See Form 195.)

§ 351. Surety Company Bonds

The surety company bond is similar in its general nature to a personal bond; its carefully restricted liability and the fact that it is signed by a surety company instead of by individuals constituting the only material difference. The surety companies supplying these bonds are usually well-known and substantial, and the conditions surrounding the issue of their bonds are such as to make the security afforded far superior within its limits to that of the ordinary personal bond.

When a surety company bond is desired, the treasurer

makes his application in prescribed form, specifying the amount required. The company then investigates the character and standing of the treasurer to decide whether he is a suitable person for the position and one who may be safely bonded. If he is accepted, a fee is paid the company according to the amount of the bond and the nature of the risk, and the bond is issued.

The treasurer's application to a surety company is formal. It usually involves a very complete statement of his past history and present condition, covering his social and business habits, standing, and connections, and giving all such details of his earlier and present life as will enable the surety company to judge of his fitness as a custodian of money and property. The applicant is also required to give a number of suitable references, i.e., people who, while not relatives, have been in a position to judge of the character and responsibility of the applicant. These references are communicated with and a written statement as to the important features of the treasurer's character, reputation, and past history are, if possible, obtained from each. The investigation is usually thorough and searching. If the applicant passes the ordeal successfully, the company issues its bond in accordance with his application.

In the case of a corporation treasurer, the surety company's fee for a bond of moderate amount—say a few thousand dollars—is from $4 to $7 per annum for each thousand dollars of bonded obligation assumed by the company. These fees are sometimes paid by the treasurer himself and sometimes by the corporation. It would seem proper that the corporation should assume this expense, though no established rule prevails.

Bonding by a surety company is, as has been said, a strictly business transaction. Before taking the risk the company makes a careful investigation and takes every proper precaution. Its fees are based on careful calculation and long

experience and are an adequate payment for the risk assumed. A certain percentage of loss is anticipated. Then, when loss does occur for which the company is liable under its bond, there is seldom, if ever, any attempt on the part of a reputable and responsible surety company either to evade or delay payment of its obligation.

Further, it may be said that the reputation and financial standing of the surety companies engaged in the business of bonding may be easily and satisfactorily established; that there is usually neither trouble nor delay in payment when unquestioned obligations arise; that in case of doubt, necessitating legal proceedings in order to determine whether or not the bondsmen are liable, the courts construe the bonds given by surety companies much more strictly than in the case of bonds given by individuals, and, finally, that in spite of its limited protection and many conditions, the surety company bond has almost superseded the personal bond.

§ 352. Liability of Bondsmen

The contract of the bondsmen or surety company is an agreement to indemnify the corporation against loss occurring through the defaults of the treasurer. The treasurer joins with his bondsmen or with the surety company in signing the bond. This is not for the purpose of binding himself to the corporation, to which he already owes a duty, but for the purpose of obligating himself to save his sureties harmless. In bonds prepared by the surety companies the obligation of the surety company is usually made conditional upon the signing of the bond by the treasurer.

If the bond is phrased "jointly and severally," the bondsmen signing the instrument are each individually liable to the full amount of the bond, and action in case of loss may, if desired, be commenced against the treasurer alone or against any one of his bondsmen, or against any or all of the parties

at the same time.[3] In Massachusetts suit in such case must be brought either against one or against all the obligors.[4] As among themselves, however, each one of the bondsmen is responsible for his individual proportion of any loss incurred and, if payment is enforced from one bondsman, he is legally entitled to collect the pro rata amount due from each of his fellow bondsmen.

If the bond is phrased "severally" as opposed to "jointly and severally," then each bondsman is liable only for his proportionate amount of the bond, or of any less amount becoming due thereunder, and in case of loss, proceedings must be brought against each one of the bondsmen for his individual liability.[5]

Usually liability of a personal bond is limited to the amount actually and directly lost by the neglect or dishonesty of the treasurer. In case the amount of such loss is less than the amount of the bond, the bondsmen are liable only for the loss actually incurred but are still held on the bond for any future losses and this liability continues until the bond expires or until they have paid out the full amount of their obligation thereunder. If the loss is greater than the amount of the bond, the bondsmen are liable up to its full amount but not beyond, and upon payment of its amount the bond is extinguished and of no further effect. In other words, the amount specified in the bond marks the limit of the bondsmen's liability.

When a bond is once executed the bondsmen cannot withdraw or escape from its liability until the legal termination or prior cancellation of the bond. They may have reason to suspect the treasurer of dishonesty or carelessness, or for other reasons may greatly desire to end their liability, but this they

[3] Poullain v. Brown, 80 Ga. 27 (1887); McKee v. Griffin, 60 Ala. 427 (1877); Trustees v. McBride, 81 Misc. (N. Y.) 618 (1913).
[4] Leonard v. Speidel, 104 Mass. 356 (1870).
[5] State v. Powers, 52 Miss. 198 (1876); Brandt on Suretyship, § 194.

cannot do unless with the consent of the corporation. They may neither cancel their obligation nor escape it.[6] They can only wait until time works their relief or perhaps their ruin. A cancellation clause is sometimes inserted in personal bonds, and always in surety company bonds, for the express purpose of its termination, if desired, before the end of the bonded period.

The undertaking of a bond is an onerous one that should not be entered upon by individuals as lightly as is usually done. The expectation is, of course, that no loss will occur and no active obligation fall upon the bondsmen. Instances showing the fallacy of this expectation are, however, numerous, and when liability does arise, the results are apt to be serious—too serious to justify the signing of a bond as a mere matter of friendship, when a few dollars will, as a matter of ordinary business, obtain perhaps a better bond from a responsible surety company. A personal bond is an imposition on the individuals, and does not safeguard the corporation.

In case of doubt, or when legal proceedings are necessary to enforce the liability of bondsmen, the courts, as already stated, construe the bonds given by surety companies much more strictly than the bonds of individuals. The leniency shown the individual in this case arises from the fact that he generally takes no part in the writing of the instrument and does not profit from the transaction. He is in fact merely an accommodation party and is therefore entitled, in case of doubt, to the strictest construction in his favor.[7]

In the case of a surety company, the reverse of all this is true. The company itself prepares the form of bond, carefully investigates and limits the risk it assumes, protects itself in every particular, and is paid adequately for its undertaking. Hence, when the courts pass upon such a contract, their con-

[6] Stearns on Suretyship, § 119.
[7] Stearns on Suretyship, § 255; Ulster Co. Sav. Inst. v. Ostrander, 15 App. Div. 173 (1897); Ward v. Stahl, 81 N. Y. 406 (1880).

struction in case of doubt is against the surety and in favor of the party seeking indemnity.[8]

§ 353. Termination of Bond

Unless the treasurer's bond contains some clause providing that its liability shall continue, or sooner terminate, it is limited to the term of office for which the treasurer was elected. If the treasurer is re-elected, his bond, unless specifically so provided in the instrument, does not pass over to the new term but must be renewed.[9] Also, if the election of officers fails and the treasurer holds over beyond the elected term, his bondsmen are not responsible for this hold-over term unless this continuing responsibility is clearly expressed in the bond.[10]

The death of the treasurer terminates his bond, as does likewise his peremptory or accepted resignation, provided in either case that all the corporate funds and other corporate property entrusted to him are returned. Also, if there is any material change in the duties and responsibilities of the treasurer, the old bond may be terminated or vitiated by the changed conditions and a new bond should then be required.[11]

It is to be noted that while the liabilities of a bondsman are limited to losses occurring during the term for which the bond is given, the bondsmen are not released entirely at the end of this period, but may still be held for any defalcation or loss which occurred during the bonded term, even though such loss were not discovered until long after this term expired. In other words, the bondsmen undertook to make good certain possible specified losses if they occurred during a certain specified time, i.e., during the treasurer's term of office.

[8] Am. Surety Co. v. Pauly, 170 U. S. 133 (1897); Tarboro v. Fidelity Co., 128 N. C. 366 (1901).
[9] Citizens' Loan Assn. v. Nugent, 40 N. J. L. 215 (1878); Savings Bank v. Hunt, 72 Mo. 597 (1880); Ulster Co. Sav. Inst. v. Ostrander, 163 N. Y. 430 (1900).
[10] Brandt on Suretyship, § 191; Ulster Co. Inst. v. Young, 161 N. Y. 23 (1899).
[11] National, etc. Assn. v. Conkling, 90 N. Y. 116 (1882); Smith v. Molleson, 148 N. Y. 241 (1896).

If such losses do occur, the mere fact that they are not discovered till later does not affect the liability of the bondsmen one way or the other, unless perhaps the bondsmen's liability is then barred by the statutes of limitation, or some limitation has been imposed by the terms of the bond. It has been held that defalcations in three successive years under an original bond and two renewals were recoverable, although the total amount was greater than the liability of the bond for any one year.[12]

This continuing liability is a disturbing feature of the personal bond and is a strong reason for its avoidance. In a surety company bond, on the contrary, this feature is taken into consideration and provided against by careful limitations.

[12] Campbell Milk Co. v. U. S. Fidelity & G. Co., 161 App. Div. (N. Y.) 738 (1914).

CHAPTER XLVII

THE TREASURER'S REPORTS

§ 354. The Report to Directors

In the smaller corporations the directors usually keep in close touch with both the corporate business and its records, and a formal report from the treasurer will hardly be required more than once a year.

In the larger corporations monthly reports showing the condition of the corporate affairs are usually required, the details and scope of these reports depending somewhat on the nature of the corporate business. An annual report is also made at the end of the corporate year, usually similar in form to the monthly reports but covering the operations of the entire year.

There should be no reservations in the treasurer's report to the directors. The directors are responsible for the management of the business and should be fully informed on every detail of the corporate operations that will assist them in the intelligent and capable discharge of this responsibility. Occasionally it will happen that special transactions are not divulged to the entire board of directors, but this is exceptional and is proper only when the directors themselves concur.

The treasurer's report, whether monthly, quarterly, or annual, should, for the period covered, give the source and amount of moneys received, the amount and nature of disbursements, the earnings and expenses, and the assets and liabilities as of the close of the reported period. Any special data peculiar to the particular time or period, or of importance to the financial operations of the corporation, should also be embodied in the treasurer's report.

The form and the details of the report submitted depend on the requirements of the board and also on the possibilities of the accounting system. If profits can only be ascertained annually or semiannually after taking an inventory, then the monthly report cannot embody an accurate balance sheet, or a profit and loss statement. A summarized statement of cash receipts and disbursements can always be made and such statistical data as gross sales, returns, purchases, etc., can be presented if desired. If made in a comparative form, i.e., if the data of the corresponding year is also inserted, the directors will be able to draw some valuable conclusions. Frequently, when possible, a comparative balance sheet is also submitted showing the assets and liabilities as at the close of the month of the report.

Usually a comparative profit and loss statement is made up showing the earnings and expenses for the corresponding month of the previous year. The expenses are not detailed in this statement, reference being made to the analysis book which shows in comparative form the detailed expenses of each month. This book should accompany the report when it is submitted to the directors. This obviates the necessity for detailing all expenses in the report, which should be done if an analysis book is not kept or is not presented to the board.

The treasurer's annual report to the directors should follow the general form of the monthly report.

§ 355. Report to Stockholders

The stockholders compose the corporation and are entitled to information as to its condition and progress. Frequently, however, there are trade reasons for withholding the more confidential details from them. It is obvious that if a full showing of the corporate business and the results of its operations were made annually to the stockholders of a corporation, it would become public property and serious results might

follow. Primarily, for this reason, but also because the stockholders do not need nor usually desire fully detailed statements of the corporate business, the reports made to the stockholders are almost always general in their character.

The report to the stockholders generally takes the form of a statement of earnings designed to give a view of the company's operations. Sometimes a condensed balance sheet will make an excellent stockholder's report. This may be accompanied by an income tax statement showing the earnings for the year, and also by a condensed general profit and loss account. In many of the larger corporations, more or less directly connected matter accompanies the balance sheet. (See Form 118.)

In many corporations the treasurer makes no independent report, the president's report covering the general affairs and conditions of the corporation together with its finances and plans for the future. This is true, for instance, of the United States Steel Corporation, where but one formal report—that of the chairman of the board—is made to the stockholders. In perhaps the majority of cases, however, the treasurer makes his own report to the stockholders, covering in it such details of the financial affairs of the corporation as the directors deem it expedient for the stockholders to know; or, to express it otherwise, all such financial details as will be of interest to the stockholders, the publication of which will not result in injury to the company's business.

Where but one formal report is made to the stockholders and this report is made by the president, the treasurer or the treasurer's department will, of course, supply the president with material for the financial portion of the statement. In any case, the two officials should work in sufficiently close touch to prevent any serious overlapping of their reports. (See Form 117.)

Part XI—The Corporate Finances

CHAPTER XLVIII

THE CORPORATE FUNDS

§ 356. General

"Corporate funds" is a general term applied to the moneys belonging to the corporation. Technically, the term "funds" includes securities as well as moneys, but used in connection with the treasurer's work it is customary to restrict its application to cash, sight drafts, checks, and similar readily convertible paper. The general corporate securities, such as notes, time drafts, treasury stock, bonds, securities of other corporations, etc., are also usually committed to the treasurer's care but not under the designation "funds," the provisions regulating the matter usually employing the phrase "money and securities," in order to avoid any uncertainty as to their scope.

§ 357. Collections

Whether the treasurer is responsible for the collection of moneys due the corporation or not, is a matter determined entirely by the requirements or practice of the particular corporation.

In the smaller corporations collections falling due in the ordinary course of business are within the usual province of the treasurer: In the larger corporations they are not. In these all moneys as received are turned over to the treasurer,

but his responsibility as to collections is limited to such special collections as may be specifically assigned to him.

§ 358. Status of Treasurer as to Corporate Funds

In receiving and holding the corporate moneys the treasurer acts as the agent of the corporation. He must therefore safeguard them with all reasonable care, and use them only on account of and for the benefit of the corporation and in accordance with its instructions. So long as he acts within these limits, he is not responsible for any losses which may occur.[1]

If, however, the treasurer fails to use reasonable care in his custody of the corporate funds, i.e., the care that a prudent man of business would exercise in regard to his own funds, he will be liable for any resulting losses. Also, if he disburses, uses, or invests the corporate funds without authority, he is again liable if losses result, but, should gains be made, these gains belong to the corporation. In other words, any profits resulting from the use of the corporate funds while in the treasurer's care, belong to the corporation regardless of whether such use be proper or improper. If losses result from proper use of the funds the loss is the corporation's; but if the use be improper, the loss is the treasurer's.

This same rule holds good where the treasurer privately employs corporate funds for his own benefit or account. If the transaction is discovered, the corporation can reclaim not only its funds but any resulting profits as well. If losses occur, the treasurer can be required to make these good and in addition, in either case, is liable to prosecution for embezzlement.

Such a condition occasionally occurs where the cashier or treasurer of an institution uses its funds for speculative purposes, expecting to replace the borrowed funds from the returns of the venture, while any profits are to be retained as his

[1] First Nat. Bank v. Bank, 77 N. Y. 320 (1879).

own private gain. Usually no profits are made and the discovery of the transaction involves the defaulting treasurer in disgrace and punishment. If, however, profits should be made, these profits are the property of the corporation and, if retained by the treasurer, his offense is two-fold. Not only has he used and risked the corporate funds improperly, but he has stolen the resulting profits.

§ 359. Custody of Corporate Funds

The treasurer's responsibility for the corporate funds begins as soon as they are turned over to him and continues until they are surrendered to his successor or to some other properly authorized party.

Usually the corporate authorities designate a depository and require the treasurer to deposit the corporate funds therein. If not, it would still, as a rule, be the duty of the treasurer to deposit in a reputable bank the moneys coming into his hands, as an incident of the "reasonable care" properly required of him.

Just how soon funds should be deposited after their receipt is a matter to be decided by conditions. Usually a routine for handling the corporate moneys and securities is established and the treasurer is governed by its rules.

In the absence of any express provision or custom requiring daily deposits, small amounts of money might properly be held until a convenient time for depositing them, particularly if there were a suitable safe or vault at the treasurer's disposal in which such funds could be kept. If, however, material amounts of money were received by the treasurer during banking hours, he would ordinarily be grossly negligent if they were not deposited the same day. If received after banking hours, they should be kept in the safest place at his command until they can be deposited on the next banking day. The temporary receptacle for such funds would naturally be the

safe or vault used by the corporation for the preservation of its books, papers, and other valuables. Should the treasurer place his funds elsewhere, a very clear and satisfactory explanation of his reasons for so doing would be necessary to save him from liability in case of any resulting loss.

In the larger or more active corporations considerable amounts of money are often kept over from day to day in the various funds or for special purposes, but they are kept under such conditions of safety as to render the risk negligible. Also, as this is done with intent, and with the knowledge and consent of all parties concerned, the treasurer is not liable even though losses occur.

The general rule that the corporate funds should be deposited promptly applies particularly in the case of checks. The check is merely an order for money and, if the treasurer accepts this order and does not present it promptly for payment, he is himself liable for any loss occasioned by the delay.[2]

§ 360. Disbursement of Corporate Funds

The disbursement of the corporate funds is usually made under carefully prescribed conditions, and the treasurer can hardly incur liability in the exercise of this duty save as a result of gross negligence or downright fraud.

Usually the by-laws provide that the corporate funds shall be paid out by the treasurer in accordance with the instructions of the directors, and also prescribe the exact signature to the checks by means of which payments are made, and require that the treasurer shall take all proper receipts and vouchers. If the by-laws are silent, the directors have full power to make such rules as to disbursements as they deem proper.

If neither by-laws nor directors' resolutions make any provision as to the details of disbursements, the treasurer may

[2] Smith v. Miller, 43 N. Y. 176 (1870); First Natl. Bank v. Bank, 77 N. Y. 320 (1879).

then use his discretion and need only observe the rules of ordinary business. These would undoubtedly require that payments of importance be made by check whenever reasonably possible, and that receipts or vouchers be taken for all moneys paid out.

In no event has the treasurer authority to make payments on his own initiative. The matter is one that belongs to the directors alone and the treasurer has no right either to make a payment without their authorization or to refuse a payment when it has been directed by them.

The payments of corporate funds customarily made by the treasurer in practice without specific authorization are not in violation of this rule. Occasionally he will in an emergency or for special reasons, pay accounts without authorization of any kind, but he then relies upon the acquiescence or express ratification of the directors. (See § 117.) Usually, however, his payments, when not specifically authorized, are made under blanket instructions empowering the payment of large amounts made up of numerous small items. Or, perhaps, certain routine obligations, as the pay-roll at the end of each week, will be paid as a matter of course under the implied authority of custom.

The treasurer's responsibility for the correctness and validity of accounts paid depends upon the conditions. If bills are ordered paid by the directors, the treasurer ordinarily has no responsibility in the matter save for their proper payment, unless he is aware of doubtful or fraudulent circumstances connected with these accounts not known to the directors. If, however, under a general authorization he pays accounts which later prove to be false or fraudulent, he might be held for any resulting loss. To escape it he must show that he was unaware of, and could not have been reasonably expected to discover, the fraudulent nature of the accounts. (See Chapter XLV, "The Treasurer's Liabilities.")

§ 361. Return of Corporate Funds

At the conclusion of the treasurer's tenure of office, it is his duty to return the corporate funds to his successor or to such other party as may be designated by the board of directors. If he does not do this voluntarily, their return may be enforced by legal action.[3] If any deficiencies are discovered in the funds, the treasurer or his bondsmen must make them good, and, if such deficiencies occurred through the treasurer's wrongdoings, he is liable to a criminal action.

[3] Hunter v. Robbins, 117 Fed. Rep. 920 (1902); Consolidated, etc., Works v. Brew., 112 Wis. 610 (1902).

CHAPTER XLIX

DIVIDENDS

§ 362. Declaration of Dividends

The right of the directors to declare dividends is an incident of their general power to manage the affairs of the corporation, and is recognized either directly or by implication by the statutes of every state. The right is subject to provisions of the charter or by-laws regulating the declaration of dividends, and to any provisions of the statutes applicable thereto. The by-laws almost invariably specifically authorize the declaration of dividends by the board of directors. An example of comprehensive by-law provisions follows:

> The Board of Directors may declare dividends from the surplus or from the net profits of the Company.
>
> The dates for the declaration of dividends upon the preferred stock and upon the common stock of the Company shall be the days by these By-laws fixed for the regular monthly meetings of the Board of Directors in the months of April, July, October, and January in each year, on which days the Board of Directors in its discretion shall declare what, if any, dividends shall be declared upon the preferred stock and the common stock, or either of such stocks.
>
> The dividends upon the preferred stock, if declared, severally and respectively, shall be payable quarterly upon the thirtieth day of May, of August, of November, and the last day of February in each year.
>
> The dividends upon the common stock, if declared, severally and respectively, shall be payable quarterly on the thirtieth day of June, of September, of December, and of March in each year.[1]

[1] By-Laws of the U. S. Steel Corporation, Art. VI, § 5, "Dividends."

In the smaller corporations the by-laws regulating dividends are much more general in their provisions, usually merely restating the common or statutory law on the subject, as in the following extract:

> Dividends shall be declared only from the surplus profits at such times as the Board shall direct, and no dividend shall be declared that will impair the capital of the Company.

Under this by-law the directors have wide discretion and, provided no statutory provisions conflict, may reserve any profits they please for surplus or working capital, or may declare any legally available profits as dividends, and, so long as the exercise of their discretion is honest, can be neither restrained nor compelled.

Statutory provisions prohibiting dividends that will impair the capital stock or that will render the corporation insolvent are found in practically every state of the Union. It is but seldom that the statutes go further in respect to dividends.

The by-laws frequently regulate the declaration of dividends. In some cases they provide that a specified surplus fund shall be reserved before any dividends may be declared. In other cases they specify that, after the reservation of a designated surplus, any remaining profits shall be declared as dividends. Occasionally the matter is reversed, the by-laws requiring that dividends to a specified amount shall be declared before any profits may be reserved as surplus. Such a by-law provision is, as a rule, obviously undesirable as it compels the declaration of dividends regardless of the business conditions which should control.

Usually before the date fixed for declaration of dividends, or, if no such date is fixed, at the time a dividend is contemplated, the treasurer is called upon for a statement showing the corporate profits available for the purpose. If, however, the corporation has ample surplus profits, or if the business is

so prosperous as obviously to justify the proposed dividend, no statement is necessarily required, the directors merely declaring the dividend as a matter of course.

When the fact and the amount of the dividend have been decided upon, a formal resolution declaring it is adopted by the directors. This resolution usually fixes specifically the amount of the dividend and states to whom and when it shall be paid. The amount is ordinarily expressed as a percentage upon the par value of the stock, though sometimes as a fixed amount per share. The recipients must necessarily be stockholders of the company, but are usually stockholders of a specified future date, and the time of payment is usually fixed at a still later future date.

Thus, a semiannual dividend declared by the Pennsylvania Railroad Company November 1, provided for a payment of 3½ per cent upon the capital stock of the company, payable on and after November 30, to stockholders as registered upon the books of the company at the close of business November 4. In the notice of this dividend, the statement of the amount on each $50 share, i.e., $1.75 per share, is also included.

The directors have full power to declare a dividend effective at any future date they please. They cannot, however, antedate it. Thus, the directors could not on January 2, 1917, legally declare a dividend payable to stockholders of record on the 15th of the preceding October.[2] The power to do so would, it is obvious, open a wide door for injustice and fraud.

If the treasurer is a member of the board or is present at the board meeting, the passage of the resolution declaring the dividend is undoubtedly sufficient notice to him of the fact and he is then fully authorized to carry the resolution into effect.

If the treasurer is not present at the board meeting, a verbal statement made to him by a member of the board or by

[2] Jones v. Terre Haute, etc., R. R., 57 N. Y. 196 (1874).

the secretary of the company is a common, but in itself hardly sufficient, notice of the board's action. A personal inspection of the resolution entered in the secretary's minutes is better, and though informal is sufficient. Written notice from the secretary of the passage of the resolution, with a copy of the resolution itself incorporated, is more formal and may, if he chooses, be demanded by the treasurer. As soon as the treasurer has authoritative notice of the resolution, no matter how his knowledge is derived, he may proceed at once to the payment of the dividend in accordance with its terms.

The resolution declaring a dividend usually provides for the closing of the stock books to transfers of stock for a certain period before the dividend day, i.e., the day when the dividend is to be paid. This provision for closing the transfer books is usually and properly part of the charter or by-law requirements of the corporation. It is questionable whether the directors would have power to close the transfer books unless so authorized.

§ 363. Profits and Dividends

Profits are the only proper source of dividends. The declaration of dividends when there are no profits is contrary to law, usually involves a personal liability by the parties responsible, and in many states involves a criminal liability as well. If an illegal dividend is contemplated, any stockholder may enjoin its declaration or payment, and, should the company become insolvent, the stockholders who receive such dividends may be compelled to make restitution.[3]

The general rule in this country is that before dividends can be properly declared, any impairment of capital through business losses in previous years or through depreciation, must first be made good. In other words, dividends must be de-

[3] 2 Cook on Corp., §§ 547, 548; Stevens v. U. S. Steel Corp., 68 N. J. Eq. 373 (1905); Fricke v. Angemeier, 101 N. E. (Ind.) 329 (1913).

clared out of "surplus."[4] As it is stated in a Missouri case, "dividends can properly be declared only from the profits over and above the capital stock and the debts of the company."[5] Before declaring a dividend the directors should examine carefully the financial condition of the company and the statutory provisions regulating the declaration of dividends in the state of incorporation.

An exception to the general rule that dividends impairing the capital stock may not be paid, is found in the case of companies working mines or operating under leases, patent rights, etc. Here the corporation is organized for the express purpose of working out the property which is represented by its capital stock and the impairment and final exhaustion of this property is the object of the corporate operations.

In any such case if a company is formed "to acquire and work a property of a wasting nature, for example, a mine, a quarry or a patent, the capital expended in acquiring the property may be regarded as sunk and gone, and if the company retains assets sufficient to pay its debts, it appears to me that there is nothing whatever in the Act to prevent any excess of money obtained by working the property over the cost of working it from being divided amongst the shareholders, and this, in my opinion, is true although some portion of the property itself is sold and in some sense the capital is thereby diminished."[6] The decision in the English case from which the foregoing quotation is taken, has been generally followed in this country and is regarded as establishing the rule. It must, however, be noted that in this case the assets of the company were ample and there was no question of insolvency or charge of indiscretion in the declaration of dividends which formed the basis of litigation.

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[4] Williams v. Western Union Telegraph Co., 93 N. Y. 162 (1883); Roberts v. Roberts-Wicks Co., 184 N. Y. 257 (1906); Thompson on Corp., § 5312.
[5] Shields v. Hobart, 172 Mo. 491, 517 (1902).
[6] Lee v. Neuchatel Asphalte Co., L. R. 41 Ch. D. 1 (1889).

A difficulty sometimes arises when determining the corporate profits for dividend purposes as to what expenditures may properly be charged to capital stock account and what should be charged to current expenses. Thus, if a manufacturing concern purchases machinery and this is charged to capital stock account, the books will show a larger net profit for the year than if the item is charged to expense account. The matter is one of bookkeeping and the actual assets of the company are not affected in either case, but its profits legally available for dividends are directly increased or diminished according to the account to which the item is debited.

This question usually arises when the directors are anxious to divert every possible penny into dividends. The problem is a difficult one and its solution will vary with the conditions. "It may be safely said that what losses can be properly charged to capital and what to income is a matter for business men to determine and it is often a matter on which the opinions of honest and competent men will differ." [7] Speaking generally, only those expenditures for which stock or bonds might be issued with propriety can be properly charged to capital account.

§ 364. Equality of Dividends

Dividends, as stated, are usually declared as a percentage upon the outstanding capital stock, or as a certain amount on each class of stock, and each stockholder in any class of stock participates according to the stock he holds. This rule is absolute. "When they (the directors) undertake to declare a dividend, they are bound to make it equal and just among all who are interested. They would have no right to divide their profits among a few particular friends, neither would they have authority to say that one class of stockholders should receive a larger amount of the profits or a

[7] Gregory v. Patchett, 33 Beav. 595 (1864).

greater dividend than others. They are but the agents of the stockholders. The profits belong to the stockholders and they must apportion them fairly and justly with due regard to the interests of each and all of them. They cannot make an unjust discrimination, giving one an advantage over another. If they do this, they exceed their powers and the courts have a right to interpose their authority to prevent it."[8]

The general rule of equality applies, however, only to stockholders of the same class. In the organization of a corporation, or later if the proper formalities are observed, different classes of stock may be created and these may be given different dividend rights. (See Chapter IX, "Preferred Stock.") Thus, preferred stocks are frequently created with preferential dividends which they receive before other classes of stock receive anything at all. The difference is, however, one that was intended and one that is clearly set out in the provisions by which the preferred stock is created; and as it is understood and by implication agreed to by every stockholder of the corporation, no injustice results.

As between the members of any one class, however, dividends must be paid with absolute impartiality. The number of shares of stock each holds must determine the amount received by him when dividends are paid. The time of payment and the method of payment must be the same for all. Some, unless by consent or agreement, cannot be paid in cash while others are paid on stock or scrip. All must fare alike.[9]

§ 365. Compelling the Declaration of Dividends

The declaration of dividends rests entirely in the discretion of the board unless otherwise provided by statutes, charter, or by-laws.[10] It is but seldom that the stockholders

[8] Ludlow v. Atl. Mut. Ins. Co., 45 Barb. (N. Y.) 510 (1865); Miller, J.

[9] Jones v. Terre Haute, etc., R. R., 57 N. Y. 196 (1874); State v. Balt., etc., R. R., 5 Gill (Md.) 372 (1848); Godley v. Crandall & Godley Co., 153 App. Div. (N. Y.) 607 (1912).

[10] Hunter v. Roberts, Throp & Co., 83 Mich. 63 (1890); Burden v. Burden, 150 N. Y. 287 (1899); New York, etc., R. R. v. Nickals, 119 U. S. 296 (1886)

can compel the directors against their judgment to declare a dividend, even though liberal reservations of profits are being made for working capital or as a surplus fund for future contingencies. "The courts have, no doubt, in many cases overruled the directors who proposed to pay dividends, but I am not aware of any case in which the court has compelled them to pay when they have expressed their opinion that the state of the accounts did not admit of any such payment."[11]

There is, however, a point at which the courts will intervene to prevent undue or improper retention of profits. "The directors must act in good faith. If they fail to do so and it clearly appears that they have accumulated earnings not required in the prosecution of the business which they withhold from the stockholders for illegitimate purposes, a court of equity may interfere and compel a distribution of such earnings." [12] "Courts of equity will not interfere in the management of the directors unless it is clearly made to appear that they are guilty of fraud or misappropriation of the corporate funds or refuse to declare a dividend when the corporation has a surplus of net profits which it can, without detriment to its business, divide among its stockholders, and when a refusal to do so would amount to such an abuse of discretion as would constitute a fraud or breach of that good faith which they are bound to exercise towards the stockholders." [13]

Cases sometimes arise, however, where a refusal to declare dividends, even where apparently reasonable on its face, is inequitable because of the conditions. For instance, preferred stock not infrequently carries non-cumulative dividends, and, if these dividends are not declared in any year, they are lost to the preferred stock entirely. It is obvious, then, that if profits exist from which the dividends might be paid but the

[11] Bond v. Barrow, etc., Co., 86 L. T. Rep. 10 (1902).
[12] Matter of Rogers, 161 N. Y. 108 (1899); Wilson v. Amer. Ice Co., 206 Fed. 736 (1913); Gehrt v. Collins Plow Co., 156 Ill. App. 98 (1910); Spear v. R. R. Lime Co., 93 Atl. (Me.) 754 (1915).
[13] Hunter v. Roberts, Throp & Co., 83 Mich. 63 (1890).

directors instead of declaring these dividends, carry them over in surplus until the following year, the preferred stock has been juggled out of a dividend that properly belongs to it and there is a distinct advantage to the holders of the common stock.

Thus, if a company has a capitalization of $200,000, of which $50,000 is preferred non-participating stock carrying a 7 per cent, non-cumulative dividend, and the remainder is common stock, and the directors pay no dividends for five years although profits sufficient to pay the preferred dividends were made, these dividends, amounting to $17,500, are lost absolutely to the preferred stock. Then in the sixth year, the directors, should they so desire, might declare a 7 per cent dividend on the preferred stock amounting to $3,500, which is all the preferred stock is entitled to for that year, and thereafter declare the entire remaining profits as a dividend on the common stock. This latter then receives $14,000 that really belongs to the preferred stock.

In cases of this kind the courts are much less reluctant to intervene and will usually compel payment of the dividends on the preferred stock for any year if satisfactory proof is adduced that profits exist sufficient for the purpose, which can be used without injury to the corporation. Even here, however, the court scrutinizes the condition of the corporation closely and refuses the dividend unless it is clearly and unmistakably withheld wrongfully and to the injury of the preferred stock.[14]

§ 366. Status of Declared Dividends

When a dividend is once declared it becomes a debt of the corporation and stands on a parity with its other debts. Should the corporation become insolvent before such dividend is paid,

[14] Belfast, etc. R. R. v. Belfast, 77 Me. 445 (1885); Wilson v. Amer. Ice Co., 206 Fed. Rep. 736 (1913).

the stockholders take their place among the other creditors of the corporation and may enforce their claims as would any other corporate creditor.[15]

Further than this, if the money to pay a declared dividend is set aside in a separate fund for the purpose, even though merely placed on deposit, it has been held that this particular fund becomes the absolute property of the stockholders—a trust fund held by the corporation for their benefit—and, provided only that the dividend is legal and the fund is set aside in good faith, such fund cannot be reclaimed by the corporation nor is it liable to taxation or for the corporate debts.[16] However, "simply declaring a dividend does not create a trust fund. To create such a fund some specific sum of money must be set apart for paying the dividend. Until this is done, the relation of the corporation to its stockholders in respect to dividends is that of debtor and creditor."[17]

A dividend does not, however, become an irrevocable fact until notice of the resolution declaring it has been given or the fact that it has been adopted has become known. If the directors have voted the dividend but the fact has not been made public in any way, the transfer has not been consummated and the action of the board up to this point may be rescinded and becomes a nullity.[18]

Also, under some circumstances a formally declared dividend may be revoked. Thus, should the board declare a dividend in defiance of or in ignorance of facts which make it illegal, the action of the board may be rescinded at any time before payment of the dividend has actually been made, or its payment may be enjoined at the suit of objecting stockholders.[19]

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[15] Hunt v. O'Shea, 69 N. H. 600 (1899).
[16] Pollard v. First Nat. Bk., 47 Kans. 406 (1891); Searles v. Gebbie, 115 App. Div. (N. Y.) 778 (1906).
[17] Hunt v. O'Shea, 69 N. H. 600 (1899).
[18] Ford v. Easthampton Rubber Thread Co., 158 Mass. 84 (1893).
[19] Marquand v. Federal, etc., Co., 95 Fed. Rep. 725 (1899).

As a declared dividend is a debt due from the corporation to the stockholder, any real existing indebtedness of the stockholder to the corporation may be set off against the dividend and be deducted from it, provided the debt is actually due at the time the dividend is payable. Accordingly the corporation has full power to apply dividends in payment of subscriptions due on its stock from the stockholders.[20]

It may be noted that a contract between the corporation and a subscriber to its stock that his subscription shall be paid for in dividends, is absolutely invalid both as against the corporation and against corporate creditors. Under such an agreement, any credits of declared dividends actually made would be held a valid payment, but, in case of the insolvency of the corporation before the stock was full paid, the stockholder could be called upon to pay in cash all amounts still due on his subscription, regardless of the agreement that it was to be paid in dividends.[21]

[20] Kenton, etc., Co. v. McAlpin, 5 Fed. Rep. 737 (1880).
[21] Hawkins v. Citizens', etc., Co., 38 Ore. 544 (1901).

CHAPTER L

DIVIDENDS (Continued)

§ 367. Form of Dividends

Dividends are usually paid in cash and, unless otherwise stated, cash payment is always understood. Dividends may, however, be declared from existing profits regardless of the form of these profits. "The surplus may be in cash and then it may be divided in cash; it may be in property, and if the property is so situated that a division thereof among the stockholders is practicable, a dividend in property may be declared, and that may be distributed among stockholders." Also, if the profits are not in the form of cash and not in a form to be distributed directly as property among the stockholders, the property might be sold or be used as a basis for a loan of cash to be used in payment of dividends; or scrip, bonds or stock might be issued against it as dividends.[1]

Another method of disbursing profits occasionally practiced, is that of paying these profits to the officers of the corporation under the guise of salaries. The excess amount of these salaries represents the dividends that would otherwise be declared. It is obvious that this practice is proper only when all the stockholders are also officers of the corporation or consent to the otherwise excessive salaries. "So long as all the parties in interest, incorporators, stockholders, directors and officers, assented to the scheme for the distribution of assets by the payment of salaries, the plan was not objectionable."[2] But if any interested parties do not consent, the plan becomes not only objectionable but illegal.

[1] Williams v. W. U. Tel. Co., 93 N. Y. 162 (1883).
[2] Fitchett v. Murphy, 46 App. Div. (N. Y.) 181 (1899).

§ 368. Cash Dividends

The simplest form of dividends are those paid in cash. Such dividends are usually declared and paid from cash profits on hand. If, however, the profits of the company exist in some other form of property, the directors may, as already stated, sell such property and use the proceeds for the cash payment of dividends, or may borrow the cash on the security of this property or on the general credit of the corporation and pay the dividends from the money thus obtained; or they may, under proper conditions, issue stocks, bonds, or scrip against the property and secure cash for the payment of dividends from the sale of these securities.

§ 369. Dividends Not in Cash

If corporate profits available for dividends are in the form of property and the directors do not care to sell or encumber this property, or if they wish to reserve the cash profits for the use of the corporation, dividends may be declared in several different forms.

1. The capital stock may be increased and this increase be distributed as a stock dividend, or any unissued or treasury stock on hand may be used for the purpose.
2. Bonds may be issued to the amount of the dividend and these bonds be distributed.
3. Scrip may be issued against the profits and the scrip be distributed as dividends.
4. If the property is in such shape as to permit, it may itself be distributed as a property dividend.

Dividends in all these different forms, if issued under proper conditions, are held to be legal and are sustained by the courts.[3]

[3] Williams v. W. U. Tel. Co., 93 N. Y. 162 (1883); Soehnlein v. Soehnlein, 146 Wis. 330 (1911).

In the case of dividends paid in other forms than cash the same general rules apply as to cash dividends. There must be an equality among the stockholders, and the proportionate amount, the time of payment, and the form in which the dividend is paid must be the same for all.

It may be noted that preferred stockholders share with holders of common stock in dividends paid in other forms than cash exactly as they would if the dividends were paid in cash.[4]

§ 370. (1) Stock Dividends

In some few states stock dividends are prohibited by law. In Massachusetts telegraph, telephone, railroad and some other classes of public service corporations are forbidden to issue stock or scrip dividends. Even there, however, the end is practically accomplished by the declaration of a dividend to the stockholders. These dividends are then a debt due from the corporation to its stockholders. A simultaneous offering of stock to an equal amount is made and this stock is purchased by the stockholders, their indebtedness therefor being offset by the dividends due them.[5]

In most of the states, however, no such restriction exists and stock dividends are not uncommon, and under proper conditions are not legally objectionable. If the directors wish to retain the corporate profits to increase the capital of the corporation, "it becomes immaterial whether such increase is made by awarding the stock to stockholders as dividends in lieu of money, retaining the money for the purposes of the company, or by paying the stockholders the dividends in cash from the earnings of the company and selling the stock in the market to raise money for the use of the corporation."[6] Or as stated in a later case, "So long as every dollar of stock

[4] Howell v. Chicago, etc., Ry. Co., 51 Barb. 378 (1868); Gordon v. Richmond, etc., R. R., 78 Va. 501 (1884).
[5] Jones v. Brown, 171 Mass. 318 (1898); Hyde v. Holmes, 198 Mass. 287 (1908).
[6] Howell v. Chicago, etc., Ry. Co., 51 Barb. (N. Y.) 378 (1868).

issued by a corporation is represented by a dollar of property, no harm can result to individuals or the public from distributing stock to stockholders. . . . All that can be required in any case is that there shall be an actual capital in property representing the amount of share capital issued."[7]

A stock dividend issued against actual corporate property of at least equal value is held to be full paid[8] but, if not so issued in good faith, is not.[9]

Where a corporation purchases the stock of another corporation out of its surplus earnings and later distributes such shares of stock among its stockholders as a dividend, such a dividend is not a "stock dividend."[10]

It will be observed that a stock dividend of the kind here considered is entirely different from that derived from "stock watering," in which the new stock does not represent profits at all but is merely a dilution of the existing capital and is illegal and objectionable.

§ 371. (2) Bond Dividends

The corporate bonds may take the place of cash in payment of dividends at the discretion of the directors, provided that they are issued only against actual profits. The argument for their issue is the same as for the issue of stock as dividends. If the company has profits available for dividends, it may take these profits for the corporate purposes and replace them with the bonds and distribute these bonds as dividends. The bond dividend is held legal when issued against actually existing corporate profits.[11]

From the practical standpoint it must, however, be ob-

[7] Williams v. W. U. Tel. Co., 93 N. Y. 162 (1883); Earl, J.; Rose v. Barclay, 191 Pa. St. 594 (1899).

[8] Kenton, etc., Co. v. McAlpin, 5 Fed. Rep. 737 (1880); Berwind-White Coal Co. v. Ewart, 11 Misc. (N. Y.) 490 (1895).

[9] Shaw v. Gilbert, 111 Wis. 165 (1901).

[10] Gray v. Hemenway, 212 Mass. 239 (1912); Union, etc., Trust Co. v. Taintor, 85 Conn. 452 (1912).

[11] Wood v. Lary, 124 N. Y. 83 (1891); s. c., 47 Hun 550; N. Y., etc., R. R. v. Nickals, 119 U. S. 296 (1886).

served that bonds carry interest which becomes a fixed charge against the company and must be paid thereafter whether profits are made or not. Also the bond itself is an absolute obligation of the company which must be paid at maturity. Both these features may be objectionable, and do not exist in the case of stock.

§ 372. (3) Scrip Dividends

The favorite method of paying dividends when neither stock nor bonds are available or expedient, is by means of scrip. This is practically a deferred dividend, scrip being a certificate stating that the owner or holder is entitled to certain rights or privileges specified in the certificate—usually a certain amount of cash payable at some fixed future date. In the issue of scrip dividends the same rule obtains as in the case of any other dividends. Profits must exist as a basis for their issue.

Usually scrip represents existing profits which are not in the form of money but which may be realized upon at some future date and the money then be used to pay off this scrip. Or there may be no intention that the corporate property shall be realized upon, the expectation being that at the time the scrip becomes due, cash will be on hand for its payment without regard to whether the property in question is sold or not.

Sometimes, however, scrip represents an absolute reservation of cash profits, as in a case where the cash is available for dividends, but the directors determine that it can be used advantageously to improve the corporation's plant or equipment. It is generally within the discretion of the directors whether a scrip dividend be declared, or whether the earnings be held merely as surplus profits. The effect of the issuance of a scrip dividend is to increase the indebtedness of the corporation by the amount of the dividend.[12]

[12] Billingham v. Gleason Mfg. Co., 101 App. Div. 476 (1905); affd., 185 N. Y. 571 (1906).

The payment date on scrip may be made absolute, or it may be made contingent, as where it is provided that scrip be payable as soon as the company accumulates sufficient surplus funds for the purpose or when specific property upon which the scrip is based shall be sold, or it may be made "at the pleasure of the Company." In the latter case it has been held that the dividend must be paid within a reasonable time.[13]

Scrip is issued in many different forms. Sometimes the certificates are convertible, being exchangeable at a certain time for stock or bonds of the company on demand of the holder. At times scrip certificates entitle the holders to dividends as would stock to the same value. The scrip then partakes much of the nature of stock save that it has no voting power.

Scrip certificates, though issued as a dividend and in lieu of certain property in the possession of the corporation, do not fix the ownership of that property in the holders of the certificates. They do give the holder a claim against the corporation—not the absolute claim which the ordinary declared dividend gives, but a conditional claim dependent upon the terms of the scrip certificate.

Provided only that the principal and any interest to be paid on corporate scrip are either represented by corporate profits actually on hand, or are payable only from future profits, or profits for such payments actually exist at the time or will exist when the demands fall due, the scrip dividend is not legally objectionable.

§ 373. (4) Property Dividends

Dividends may consist of actual property, though, except in the case of corporate securities, there are obvious difficulties in the way of distribution which make such dividends rare. Thus, a company whose profits were in land, might divide this

[13] Billingham v. Gleason Mfg. Co., 101 App. Div. (N. Y.) 476 (1905).

land among its stockholders as a dividend, if it could do so equitably, and no objection could be raised. The more usual form of property dividends is, however, that of securities of other corporations received, when the corporation sells property or rights of some kind to another corporation, taking the stocks and bonds of that other corporation in payment. Or securities may have been bought outright at some previous time from profits. The stock and bonds so received are then divided among the stockholders of the receiving company as dividends. There are no objections to such dividends provided they represent actual profits.

Usually, however, dividends of this kind are declared only when a corporation is liquidated, all its property perhaps having been exchanged for stock or bonds, or both, of the purchasing corporation. In this case the distribution is not strictly speaking, a payment of dividends but is a distribution of assets, and the ordinary rule that dividends may be declared only from profits does not apply.

§ 374. Notice of Dividends

The directors of a corporation have full power to fix the time and place of payment of dividends, if reasonable and in good faith, but they must give stockholders due notice.[14]

When dividend checks are not mailed, notice must be given the stockholders of the time and place at which dividends will be paid. These notices are sent out by the treasurer or the secretary, according to the regulations of the particular corporation. The officer sending the notices must be governed absolutely by the stock book, unless he has personal knowledge or has received formal notice of the fact that some particular stockholder of record is not the stockholder in fact. The party to whom the dividend is to be paid is always the proper party to notify. If there is doubt in any particular case as to whom

[14] King v. Paterson, etc., R. R. Co., 29 N. J. L. 82 (1860).

a dividend is to be paid, responsibility may be avoided by sending notices to all the parties interested, leaving the ownership of the dividend to be settled later.

In some of the larger corporations, notice of a dividend and the time and place of payment and the period for which the stock books are closed, is usually mailed to every stockholder and is published in the newspapers as well—this latter not entirely as a legal requirement but as a general notification to the stockholders and to the general public as well that the corporation is paying dividends. The publication of the dividend notice is presumptive proof of notice to the stockholders but is not alone conclusive. If the stockholders see the notice, it is sufficient, but, if any particular stockholder does not happen to see the newspaper announcement, he cannot be held to have received notice and the corporation is liable for any resulting loss.[15]

At the present time corporations when paying dividends usually mail checks to the stockholders, and this, if properly done, avoids any possibility of failure of notice. The dividend checks are nothing more than orders upon the bank for payment of the amount due the stockholder, but the recipient of such a check has in the check itself sufficient notice of the time and place for the payment of his dividend. Where checks are mailed, a newspaper notice of dividends is usually deemed entirely sufficient.

Dividend notices are frequently signed and issued by the secretary but more commonly are issued over the signature of the treasurer. The legal effect is the same in either case.

§ 375. To Whom Paid

A stockholder of record is one whose name appears upon the stock books of the corporation as an owner of its stock. Dividends are ordinarily payable to those who at the time the

[15] King v. Paterson, etc., R. R. Co., 29 N. J. L. 82 (1860).

dividend becomes effective are stockholders of record. The stock book, therefore, at this time shows to whom the dividend must be paid.

The rule is not, however, invariable. It may be that stock is pledged and the pledgee has not had the stock transferred to his own name, though dividends are payable to him. Or occasionally it happens that stock has been sold before the declaration of the dividend, but the transfer through neglect or other cause has not been recorded on the books. The equitable ownership of the stock and the right to the dividend then vests in the party to whom the stock has been assigned, but the ownership of record still remains in the former owner.

The treasurer, in the absence of notice, has no concern as to these equitable owners. The stock books of the corporation are conclusive for his purposes until their evidence is impeached by the presentation of duly assigned certificates, or other satisfactory evidence of a different ownership or by information that would put the corporation "on notice." Therefore, even though it proves later that the holder of record is not the rightful owner of the dividend, the treasurer and the corporation are protected in payments made according to the unimpeached record of the stock books. They have used all reasonable care and cannot be held for the results of negligence on the part of others.[16]

If, however, the treasurer or the corporation receives notice of some unrecorded transfer involving the ownership of the dividend, i.e., a transfer made before the dividend became effective or perhaps thereafter with an assignment of the dividend, he is bound to take notice of the facts and pay the dividend to the rightful owner.[17]

As the stock books, if unimpeached, control absolutely, the production of a stockholder's certificate of stock is not

[16] Cleveland, etc., R. R. v. Robbins, 35 O. St. 483 (1880).
[17] Rose v. Barclay, 191 Pa. St. 594 (1899).

necessary, nor can it be required to prove his ownership either of stock or of dividends if this ownership is shown by the stock books. If the true ownership is not so shown, the duly assigned certificate is good evidence thereof and sufficient to justify the treasurer in paying the dividend to the owner of the certificate, provided only that the assignment was made before the effective date of the dividend.

If there is any real doubt as to whom a dividend is properly payable, the treasurer's only safe course is to withhold payment until the matter is satisfactorily settled by the parties themselves, or until the ownership of the dividend is determined by proper legal procedure. This litigation may involve only the disputants but may be directed also against the corporation. If in any case the corporation is likely to suffer, it may interplead and ask the court to decide to whom the dividend belongs.

In case stock stands in the name of a married woman, the treasurer must pay the dividends declared thereon to the wife or to the husband according to the requirements of the state in which the corporation is chartered.[18] In most states of the Union dividends are payable to the wife when stock stands in her name.

If stock is pledged, the pledgee is entitled to any dividends declared meanwhile even though he is not a stockholder of record, provided the corporation has had due notice of the pledge. But the pledgee must account for these dividends to the pledgor when the pledge is redeemed.[19]

If a corporation holds stock of other corporations, it is entitled to receive dividends on this stock as is any other stockholder. It cannot, however, pay dividends on its own stock held in the treasury of the corporation. When dividends are payable to a corporation the dividend check may be made

[18] Graham v. First Nat. Bank of Norfolk, 84 N. Y. 393 (1881).
[19] 2 Cook on Corps., 468.

either in the name of the corporation, or to the treasurer as treasurer of the corporation. If stock belongs to an estate, payment of dividends should be made to the administrator. If, however, the stock passes to a legatee, all dividends declared after the date of the testator's death belong to the legatee, but if any dividends have been declared before that date but are not yet paid, they will belong to the general estate.

§ 376. Payment of Dividends

It is customary to close the stock books a certain number of days before a dividend is to be paid, in order to give the treasurer an undisturbed opportunity to make up his dividend statement from the books. The "closed" period usually begins on the effective date of the dividend and continues until the date of its payment, or if this period is lengthy, for such reasonable time as will enable the treasurer to secure from the books the data he requires for his dividend statement. During this period no transfers of stock will be made.

As a rule the closing of the transfer books works no hardship. They are not usually closed until the day on which the dividend is effective. Transfers of stock made after that date do not, therefore, carry the dividend, unless by special agreement between the parties, and the fact that the transfer cannot be immediately recorded is in most cases immaterial. If transfers prior to the declaration of the dividend have not been recorded, they are, of course, shut out, and to secure the dividend which rightfully belongs to such unrecorded stockholders, they must file due notice and evidence of the facts with the treasurer.

As soon as the stock books are closed, the treasurer is furnished by the secretary with a list of the stockholders of record as they appear on the date of closing, or otherwise the stock books are turned over to him and he secures the names and the addresses of the stockholders himself. The treasurer

then makes up his dividend statement, showing the amount of stock held by each stockholder and the amount of dividends due him. The checks for dividends are made out and on the appointed date are mailed to the parties to whom they are due, or if dividend checks are not mailed, the stockholders are notified to call and receive their dividends in person.

In the smaller corporations the dividend check is usually nothing more than the ordinary check of the corporation, either marked or stamped "Dividend Check," or accompanied by a brief notice stating that the check is in payment of the specified dividend. In the larger corporations special checks are usually printed, with the words "Dividend Check" or "Dividend No. ....." or some other identifying phrase appearing on the face of the check.

Where the stockholders call in person for dividends, they are usually required to sign the regular receipt form upon the dividend book. If the checks are mailed, receipt forms are sometimes sent with them, to be signed and returned by the stockholders. Usually and preferably, however, the check itself is deemed an all sufficient receipt. When stamped "Dividend No. ....." or with some equivalent identifying phrase, as is usually the case, and indorsed by the recipient as must be done before the check can be collected, and stamped or cancelled by the drawee bank when paid, the check itself undoubtedly does afford the best possible evidence of the payment of the dividend. The check is usually accompanied by a notice that a receipt either is or is not required, as the case may be.

The dividend check is in no wise different in its nature from any other corporate check. It should be deposited or otherwise presented for payment promptly, and if this is not done, the recipient must bear any loss accreditable to such delay in presentation. The dividend check is also subject to all the usual customs and requirements relating to checks.

§ 377. Illegal Dividends

The declaration of an illegal dividend or the payment of an illegal dividend already declared may be enjoined and stopped by proper action of the stockholders.

Illegal dividends may be of three characters:

1. Those declared in disregard of the rights of some of the stockholders.
2. Those declared in violation of charter or by-law provisions of the particular corporation.
3. Those which either impair the capital stock or threaten the solvency of the corporation.

1. Dividends which are unequal among stockholders of the same class are absolutely in disregard of the rights of the stockholders discriminated against—so much so that cases directly involving the principle but seldom arise. When inequalities are attempted it is usually by means of diversions of the profits, such as payments of excessive salaries or unnecessary expenditures.

Another instance of dividends in disregard of the rights of stockholders is sometimes found when the directors declare dividends on common stock while cumulative dividends due on preferred stock have not been paid. In such a case the court will compel a readjustment of the dividends.[20]

2. Dividends declared in violation of charter or by-law provisions may be perfectly proper in themselves but illegal merely because of their prohibition. Thus, the charter or by-laws may provide that no dividend shall be declared until after surplus funds have been accumulated to some specified amount. Then if dividends are declared before this surplus has been reserved, they are illegal and payment may be enjoined by proper action of the stockholders.

3. The most common form of illegal dividends is that

[20] Luling v. Atl. Mut. Ins. Co., 45 Barb. 510 (1865).

which impairs the capital stock or which endangers the solvency of the corporation. In a case of this kind it is to some extent a matter of bookkeeping and judgment as to whether a dividend is such as to impair the capital stock or render the company insolvent. If the directors declare a dividend in good faith, after a proper investigation of the financial condition of the company, the courts are not likely to interfere.

A case of illegal dividends comes within the jurisdiction of courts of equity, and any stockholder may bring suit therein to enjoin the declaration of a dividend believed by him to be illegal. If the dividend has been declared but not paid, all the stockholders must be joined as parties. An illegal dividend may be rescinded by the directors at any time before its payment.

§ 378. Liability for Illegal Dividends

In most of the states a liability is imposed upon the directors by statute for any violation of the laws regulating dividends. In some cases offending directors are made liable for any and all debts of the corporation incurred during their term of office. In other cases they are liable only for the amount actually paid out in these illegal dividends. In some states they are held liable not only for the corporate debts, or for restitution in case of dividends illegally declared, but are also guilty of a misdemeanor punishable by fine and imprisonment.

As a rule, the treasurer is not personally liable in any way for the payment of dividends ordered by the directors unless he knows such dividends to be absolutely fraudulent. In a few states, however, liability for dividends prohibited by statute has been extended by express enactment to the executive officers of the corporation if they consent or concur therein. In such states, if the treasurer, knowing the dividends to be in violation of the statutory provision, nevertheless obeys

the instructions of the directors and either pays such dividends or permits them to be paid, he is liable with the directors. There are, it may be said, but few states in which this liability exists.

If the directors of a corporation declare a dividend in violation of its charter or by-law provisions, they may be enjoined from its payment, or if not, would undoubtedly be held liable for any resulting damage to the corporation.

When dividends are declared which impair the capital stock or render the corporation insolvent, they not only subject the directors to liabilities and in some cases penalties, but such illegal dividends may be recovered from the stockholders to whom they were paid. "It is the well determined doctrine of the courts of this country that the capital stock is a fund to be preserved for the benefit of corporate creditors. Hence the rule has been firmly established that where dividends are paid in whole or in part out of the capital stock, corporate creditors being such when the dividend was declared or becoming such at any subsequent time, may to the extent of their claims, if such claims are not otherwise paid, compel the shareholders to whom the dividend has been paid to refund whatever portion of the dividend was taken out of the capital stock." [21]

If a dividend has been paid out of the capital stock, the stockholders are conclusively presumed to have known it and are liable to an action for repayment. They cannot claim to hold the position of innocent or bona fide holders.

§ 379. Treasurer's Liability as to Dividends

As already said, in some few states the officers are together with the directors liable for dividends paid in violation of statutory provisions. As a rule, however, the declaration and payment of dividends is one so entirely within the prov-

[21] 2 Cook on Corps., § 548.

ince and discretion of the board that the treasurer is not held liable for any dividends paid in accordance with the board's directions, unless they should be absolutely fraudulent.

The treasurer usually furnishes to the directors the statement of the corporate accounts and finances which determines whether or not dividends shall be declared. It is his duty to provide an accurate statement and, should his presentment be so erroneous or so carelessly compiled as to mislead the directors and cause the declaration and payment of improper dividends, he would have failed in the "due diligence" and reasonable care exacted of the treasurer as an agent of the corporation and would be liable for any resulting loss.

Beyond this the treasurer is also responsible for the proper payment of dividends, not only as to the actual computation of amounts due and the proper drawing of the dividend checks, but for their delivery to the proper persons.

CHAPTER LI

BONDS

§ 380. Nature of a Bond

When a corporation borrows money, its indebtedness may be evidenced by either notes or bonds. If the amount borrowed is small, or if it is borrowed in a single sum, or but from few persons, or for a short time, notes are usually given. If, however, the amount is large and obtained from a number of people and extends over a period of years, the corporate obligation is preferably and usually evidenced by bonds.

The difference between a corporate note and a bond is not always clearly marked. Both are promises to pay money. The phrasing of the bond is usually more formal than that of the note. Also it must be executed under seal while the corporate note need not. Also payment of bonds is usually, though not invariably, secured as to both principal and interest by certain specified property held for the purpose under a formal deed of trust.

A bond payable to order, or bearer, or holder is a negotiable instrument and this in spite of the fact that it is executed under seal. Hence, if such a bond is in due form and is purchased for value and in good faith, the purchaser is protected against any defenses set up by the corporation and against any claims of previous owners.

A bond issue consists of a number of bonds which, while they may vary as to denomination, and some may be registered and some unregistered, are all of like general tenor, and if secured are all secured, and, unless otherwise expressly provided, equally secured, under one deed of trust.

Bonds are issued in varying denominations but those of

the larger corporations are usually of $1,000 denomination and issued in coupon form. $500 bonds are not infrequently issued and $100 bonds are seen occasionally.

Coupon bonds usually have a space for the recording by the company of the name of the bond owner when the latter so desires, the company or its fiscal agents keeping a record of all such registrations. Such bonds are termed "registered as to principal only" and, until registered "to bearer," negotiability by delivery ceases. The interest instalments on such bonds continue to be represented by coupons which are payable to bearer. Coupon bonds can usually be exchanged for "fully registered bonds" without coupons, these usually being issued in denominations of $1,000, $5,000, $10,000, and even larger. The interest on fully registered bonds is paid by check, as in the case of dividends on stocks, to the holder of record.

The advantage of the unregistered coupon bond is found in the readiness with which it may be transferred. The advantage of a registered bond lies in the difficulty of its negotiation in case the bond is lost or stolen. If a bond payable to bearer is either lost or stolen, its sale or disposal is comparatively easy and, once in the hands of an innocent holder for value, the stolen bond is valid. A registered bond, on the contrary, should it be lost or stolen, is practically non-negotiable. It is payable only to the party named in the bond, and a successful negotiation of the bond involves a forgery of his signature which would prevent a valid transfer.

When registered bonds are assigned, the assignee usually surrenders the old bond and receives in exchange a bond issued in his own name, the new ownership being recorded upon the books of the company at the same time.

Bonds are a direct corporate obligation and do not in any way partake of the nature of stock. They may, however, be given rights of participation in corporate profits if desired,

and, in the absence of statutory prohibition, may be given voting rights as well. But even though this last privilege is extended, it is rarely exercised if the bonds are in coupon form and widely scattered.

§ 381. Authorization of Bond Issues

"The power of a corporation to borrow money is implied and exists without being expressly granted by charter or statutes."[1] In the absence of restraining laws, a corporation may therefore issue corporate notes and bonds to any desired amount.

In most states, however, constitutional or statutory provisions are found directly limiting or otherwise affecting the common law right of corporations to borrow money or incur debt, particularly by the issue of bonds, and in many states statutes prohibit the directors from issuing bonds until authorized thereto by the stockholders.

§ 382. Statutory Provisions

Constitutional provisions affecting the issue of bonds are found in many states but as a rule confine themselves to the requirement that bonds shall be issued for value only and that any fictitious increase of indebtedness is void.

Statutory provisions limiting the amount of corporate indebtedness are found in many states. Thus in Florida, Kentucky, Minnesota, and some other states, the maximum corporate indebtedness that may be incurred must be stated in the charter. In Colorado, California, Idaho, Illinois, and a number of other states the corporate indebtedness must not exceed the amount of the capital stock. In other states, as Nebraska and Vermont, the corporate indebtedness must not exceed two-thirds of the capital stock. In New Hampshire it may not exceed one-half the value of the company assets.

Provisions requiring the assent of a specified majority of

[1] 3 Cook on Corps., § 760.

the stockholders before bonds may be issued are also found in many states. Thus in California, Nevada, New York, and other states, a bond issue must be authorized by a two-thirds vote of the stockholders. In Alabama, Missouri, Pennsylvania, and a number of other states, it may be authorized by a mere majority of the voting stock. In Ohio a three-fourths vote of the stockholders is required before convertible bonds may be issued. The statutory provisions also frequently specify the notice which must be given for stockholders' meetings to authorize bond issues.

In some states specific provisions exist as to the selling price of bonds, as in North Carolina where the statutes provide that bonds may be sold below par and commissions may be paid upon the sale, or in Wisconsin where the true value of the money, labor, or property received for bonds must be at least 75 per cent of their par value. The Wisconsin provision, it must be added, is somewhat weakened by the further enactment that, notwithstanding its terms, bonds may be sold at the best price obtainable on the stock exchanges of Chicago, New York, Boston, or Philadelphia.

Special provisions as to bond issues are found in some states, as in Louisiana, New Mexico, Nevada, Missouri, New Jersey, and Ohio, where the statutes expressly authorize the issue—under proper procedure—of bonds convertible into stock; or in Delaware, where bondholders may be given the same rights as stockholders; or in Nevada and Virginia, where by proper procedure bondholders may be given the right to vote. It may be noted that the Illinois courts hold that bondholders cannot be given the right to vote at corporate meetings.

§ 383. Debentures

The payment of corporate bonds may be either secured or unsecured. If unsecured, the bonds are usually termed "debentures."

The usual unsecured debenture bond is merely the formal corporate promise to pay money. It is an obligation of the corporation but, as it is unsecured, there can be no foreclosure in case of default on either interest or principal. In such case the holder has no remedy except the ordinary suit at law on an unpaid note. It is merely an unsecured debt of the corporation and has no precedence over any other unsecured debt. Its claim is superior to that of preferred stock but is inferior to that of any secured indebtedness of the corporation. Its value depends entirely upon the financial strength of the issuing corporation.

Sometimes bonds are secured by the deposit with a trustee of collateral security—usually stocks and bonds of other corporations. The bond is then in effect a collateral note and is frequently termed a "collateral trust bond."

§ 384. Mortgage Bonds

A mortgage bond is one the payment of which is secured by a mortgage or deed of trust on part or all of the property of the corporation. This deed of trust usually authorizes the trustees, in case of default on interest or principal of the secured bonds, to take possession of the property and either operate it or sell it, as may be provided, for the benefit of the bondholders.

"Mortgage" bonds are in effect first mortgage, second mortgage, etc., according to the lien of the deed of trust by which they are secured. But unfortunately a so-called first mortgage bond is not always what its name implies, as it may be preceded by a prior lien mortgage securing bonds senior in lien to those issued under the so-called first mortgage. A notable instance of this is the Toledo, St. Louis, and Western first mortgage 4 per cent bonds, which are actually junior in lien to a larger issue of 3½ per cent bonds.

A second mortgage bond secured on the same property

as that already covered by one mortgage is a second lien, i. e., in case of foreclosure the first mortgage bonds must be paid in full, both principal and interest, before the holders of the second mortgage bonds receive anything. Hence, real first mortgage bonds are more desirable than those of a junior lien, i.e., those of an inferior or later lien, unless the property is of such value as to be an absolute and unquestionable security for the entire amount of outstanding bonds; but a bondholder must ascertain that the so-called first mortgage bond is actually a first mortgage or first lien, and not such in name only.

§ 385. Coupon Bonds

Coupons are in effect promissory notes, each calling for the payment of one instalment of interest on a bond. A coupon bond is one to which such coupons are attached, each coupon requiring payment on its due date of the interest instalment represented by that particular coupon. The interest on such bonds is payable to the holders of these coupons and not to the holder or owner of the bonds.

Interest on bonds is usually payable semiannually, and each of the coupons attached to a coupon bond calls for the exact amount of one of the semiannual interest payments on that bond. (See Form 199.) Thus a bond running ten years with interest payable semiannually would have attached to it twenty coupons. Each coupon is numbered to correspond with its bond but also has a serial number—running from one to twenty in the instance cited—indicating the order in which the coupons come due.

§ 386. Form of Bond

The language of a bond is usually more formal than that of a note, it must be executed under seal, and, if secured, reference is made in the bond itself to the deed of trust under which it is issued.

Usually a statement of the general conditions of a bond issue appears upon the face of each bond and reference is made to any features of special importance, such as the existence of a sinking fund, the conditions of redemption, the method of transfer and exchange when bonds payable to bearer and registered bonds are issued under the same deed of trust, etc., etc. (See Form 198.)

§ 387. Form and Nature of Coupon

A coupon is in form a promissory note. (See Form 199.) It is attached to the bond as a convenient method of indicating the amount and the due date of interest and for its collection when due. One coupon is attached to the bond for each interest instalment. Thus a twenty-year bond with semiannual interest payments would carry forty coupons. These coupons are numbered serially and also carry the number of the bond to which they are attached. Coupon No. 1 represents the interest that will be due at the first interest period. As soon as that period arrives the coupon matures and it is then detached from the bond and either presented for payment or deposited for collection as would be done with any other promissory note.

When an interest payment on coupon bonds is about to fall due, the amount necessary to meet the maturing coupons is usually deposited in some designated bank which acts for the corporation and pays the coupons as they are presented. The coupons are then cancelled and are pasted in the coupon register.

§ 388. Trustee's Certificate

Bonds issued under a deed of trust must usually be certified by the trustee before they are issued. The trustee's certificate appears on the back of each bond, and evidences the fact that the bond is one of the issue mentioned in the

deed of trust. (See Form 200.) As a rule, the object of this certificate is merely to identify the bond and to prevent overissues. If the trustee certifies more bonds than are called for by the deed of trust, he may make himself personally responsible for the overissue, but otherwise he incurs no liability whatsoever by reason of his certification.

A certification is not part of the bond, though it may be required before the bond itself can be considered as issued, nor is it in any sense an indorsement of the bond nor a certification of its correctness as to form or subject matter.

§ 389. Deeds of Trust

A deed of trust is a mortgage on certain specified property given to a trustee who acts for the holders of the bonds secured thereby. The deed of trust recites at length the terms and conditions under which the bonds are issued and under which the property for their security is held. (See Form 201.)

A modern deed of trust is usually a very comprehensive and formidable instrument. A brief form may occupy perhaps from ten to twenty pages of printed matter. More extended forms frequently occupy one hundred pages or more.

In the bond itself reference is always made to the deed of trust by which it is secured, and in the deed of trust the bond is recited in full. The bond by express terms is subjected to the conditions of the deed of trust. Accordingly the statements of the bond are controlled by the explanations and any non-conflicting conditions of the deed of trust. If, however, the terms of the bond and of the deed of trust conflict, the bond prevails.[2]

If the deed of trust fails for any reason, the bonds then become the unsecured obligation of the corporation and take their place on a parity with the other unsecured corporate debts.

[2] Railway Co. v. Sprague, 103 U. S. 756 (1880).

§ 390. Recitals of Deed of Trust

In the deed of trust usually employed the preamble recites the conditions precedent to the issue, the form of bond in full, and the form of coupon and trustee's certificate, also in full, followed by the granting clauses, including description of property covered, and by the trust reservation with stipulation for equal participation of all the bonds of that issue in the protection afforded by the mortgaged property.

Following this come the "covenants, conditions, uses, and trusts" subject to which the bonds are issued and the mortgaged property is held. These have a wide range. Some of the more usual are as follows:

1. Procedure for execution, certification, and delivery of bonds.
2. Enjoyment of property by mortgagor until default in payment.
3. Payment of principal and interest without deduction for taxes, and in "gold coin," "legal tender" or otherwise, as the case may be.
4. Payment of all taxes and assessments on property held under the deed of trust and, if the nature of the property is such as to require it, maintenance of the same in repair, under due insurance and free from liens.
5. Provision for any necessary additional assurances for protection of bondholders.
6. Provision for trustee to enter upon property and conduct business without foreclosure under certain conditions.
7. Sinking fund for retirement of bonds.
8. Procedure for foreclosure in case of default.
9. Provision that bonds shall be matured by failure to pay interest.

10. Stipulation that loans, advances, or payments made on coupons for account of the mortgagee shall not keep such coupons alive.
11. Provision for redemption of bonds.
12. Provision for discharge of deed of trust.
13. Provision for substitution or appointment of new trustee.
14. Disclaimer of responsibility on part of trustee.
15. Interpretation of terms used in deed of trust.
16. Provision that deed of trust may be executed in duplicate parts.

In addition to these common provisions, others are often dictated by particular conditions. Thus, if both registered and coupon bonds are issued, provision must be made for registration and for the exchange of one for the other if this is prescribed; also provisions may be inserted for the issue of temporary certificates, or for replacement of destroyed or mutilated bonds, or for discrimination against coupons detached or assigned before maturity, or for exemption of the stockholders and officers of the issuing company from all liability under the deed of trust or for the bonds issued thereunder; or in a mortgage on realty it may be provided that upon payment to the trustee of a certain specified price, parts of the property may be sold free from the incumbrance of the mortgage, or that under prescribed conditions properties may be withdrawn from the mortgage and new properties substituted in their place.

The duties of the trustee under a deed of trust are usually few but may be onerous. He certifies each bond issued. At times the recording of the deed of trust is made one of his duties. In case of default he is usually required either to take possession of the property and operate it or sell it, according to the conditions of the deed of trust, for the benefit of the

bondholders. If called upon to operate the property, his duties and liabilities may be heavy.

§ 391. Execution and Filing of Deed of Trust

The deed of trust is executed with the same formality as a deed of land. It must be signed and sealed both by the corporation and by the trustee, and be duly acknowledged before a notary public or other duly authorized officer. The corporate signature is usually affixed by the president and the corporate seal is affixed and attested by the secretary. The acknowledgment is also usually made by the president of the corporation, but is of equal force if made by the secretary, treasurer, or any other duly authorized executive officer. It is immaterial whether the deed of trust be executed within the state in which the corporation was organized or elsewhere.

If realty is included the deed of trust must be filed in the office of the county clerk in every county in which the real estate is situated.

§ 392. Sinking Fund

A sinking fund as applied to bond issues is a fund created for the purpose of redeeming the bonds when due, or prior thereto, as may be provided by the deed of trust. Thus, bonds may be retired from time to time as the sinking fund accumulates, or the fund may be allowed to remain intact until the maturity of the bonds, when, if properly constituted and maintained, it is sufficient for the retirement of the issue.

Sinking fund requirements will vary with the conditions. Sometimes a stated annual amount is paid into the fund. At other times the income from a certain source will be devoted to this purpose. Coal mining companies frequently reserve a certain amount for each ton of coal mined. Lumber companies sometimes reserve a certain amount on each thousand feet of lumber cut.

In the smaller corporations the sinking fund is usually informal and is kept in the custody of the corporation. For the larger bond issues, a sinking fund is usually established in the hands of a special trustee, who holds it subject to the conditions of the deed of trust.

The wisdom of a sinking fund is, in the case of most bond issues, apparent. Reserving as it does a moderate amount each year for the payment of the bonds, their final redemption is effected with comparative ease. Without such a fund another bond issue to retire the maturing bonds, or a default, would be the probable result.

In the case of railroads there is a tendency to dispense with sinking funds when bonds are issued for permanent additions or improvements, the bonds when due being replaced by a second issue. This is based upon the principle that the additions or improvements being permanent and being maintained out of earnings, are as much for the benefit of subsequent as of present stockholders and that the present stockholders should not be deprived of their dividends merely to provide a more valuable property and larger dividends for those who come after.

§ 393. Sale of Bonds

Unless prevented by statutory enactment, bonds may be sold at any price that can be obtained. In most of the states there are provisions that bonds may be issued only for value actually received, but, in the absence of some more specific limitation, bonds may still be issued below par if in good faith. In some few states more specific provisions exist.

The sale of bonds below par by the issuing corporation may, however, constitute an infraction of the laws against usury. Thus, if a 5 per cent bond on the face value of $1,000 be sold for $500, the rate of interest paid on the money so secured is 10 per cent. If, then, this exceeds the legal rate of

interest in the state in which the sale was made, the transaction is usurious and illegal, and for this reason the original purchaser, or subsequent purchaser knowing the conditions, might be unable to enforce the payment of his bond. This could not, however, be the case if the bonds were in the hands of an innocent holder for value, nor in states in which the statutes are silent as to usury, nor in states where bonds may by statute provision be sold below par, nor in states where corporations are not allowed to avail themselves of the defense of usury.

§ 394. Liabilities of Vendor

The vendor of a bond does not warrant the legality of the issue nor in any way guarantee payment of the bond. All he undertakes is that as far as he has knowledge the bond is legally issued and what it purports to be, that it has come into his hands in due course and for valuable consideration, and that he is legally competent to transfer it to the purchaser. In this the bond differs from a note, draft, or check, which the vendor is held to guarantee unless assigned "without recourse."

§ 395. Rights of Holders

A bond as a negotiable or quasi-negotiable instrument is not subject to the defenses that might exist between the original parties. In practice, "the courts go very far in protecting bona fide holders of corporation bonds, and will uphold and enforce such bonds under nearly all circumstances. The defense that the bond was issued below par does not avail as against a bona fide holder.[3]

A first mortgage bond does not lose its priority though issued after a second mortgage bond. Nor does the number or date of issue of a bond in any way affect its rights of pay-

[3] 3 Cook on Corps., § 766; also Dickermann v. Northern Trust Co., 176 U. S. 188 (1900).

ment as regards the other bonds of the same issue, unless expressly so provided by the bond or the deed of trust. Such provisions are legal but unusual and, as a rule, every bond of an issue has all the rights of any other bond of that issue.

Bonds cannot be paid by the issuing corporation before they are due save by consent of the holders, unless there is express provision in the deed of trust for such prior redemption, but this does not preclude their purchase in the open market prior to maturity by the debtor corporation. If, at the maturity of the bonds, all are not presented for payment, the trustee may reserve a sufficient amount of money for the retirement of the missing bonds and discharge the deed of trust.

Suit may be brought on a bond or coupon if not paid at maturity, just as suit may be brought on a promissory note, and this even though the mortgage is not foreclosed. In case of judgment, however, no execution may be had against the mortgaged property. In some few states, as in New Jersey, such suit by the individual holders before foreclosure is forbidden by statute.

In case of foreclosure, if the property held under the deed of trust is not sufficient to pay the bonds secured thereby, the bondholders have recourse against the corporation for the balance due.

§ 396. Redemption of Bonds

The date of maturity of bonds is stated in the deed of trust and also on the face of each bond. The deed of trust also usually provides that if any instalment of interest is not paid when due and the default continues for some specified length of time, the principal of the bond is thereby matured and must be paid.

In event of default either on principal or interest, it is usually provided that foreclosure may follow, or perhaps, preliminary thereto or in lieu thereof, the trustee is authorized to

take possession of the mortgaged property and operate it for the benefit of the bondholders.

When bonds are redeemed in accordance with the terms of the deed of trust, they are cancelled and cannot be reissued unless expressly so provided in the deed of trust. A corporation might, however, purchase its bonds in the open market and sell them again later.

In some cases provision is made in the deed of trust for redemption of bonds prior to the maturing date. Also, convertible bonds are at times issued which, if the holder elects, may be redeemed in stock of the corporation. Also at times it is provided that as the sinking fund accumulates, the funds may be used from time to time to redeem the outstanding bonds.

§ 397. Investment Value of Bonds

If bonds are purchased at par, the return on the investment is the exact interest paid on the bond. If, however, bonds are purchased either above or below par, the determination of the actual return on the money invested becomes somewhat difficult.

Thus, if a $1,000 bond due in ten years and bearing interest at the rate of 5 per cent, is purchased at $900, it is obvious that the direct interest on the investment is considerably in excess of 5 per cent, amounting to 5 5/9 per cent. In addition to this, when the bond is paid at maturity, its full face value of $1,000 is received, giving a further return or profit of $100 on the original investment.

On the other hand, if the bond is purchased at a premium, say at $1,100, the direct interest returns are but 4 6/11 per cent, and on maturity of the bond the purchaser receives but $1,000 which is $100 less than the price he paid for his bond. There is therefore a double loss—both on interest and principal.

A rough approximation of the returns on the investment when bonds are purchased at a discount or at a premium, may easily be made, but if exact results are to be reached—which are required when large investments are to be made—the calculations are laborious. For use in such cases bond tables may be purchased from which the actual investment value of any ordinary bond, whether sold at a discount or at a premium, may be found at any period of its life.

§ 398. Kinds of Bonds

Many classes of bonds are issued under varying designations, usually derived from the more important or distinctive features of the particular issue. The bonds most frequently issued are briefly discussed in the present section.

Bonds frequently possess the characteristics of several different classes. Thus, the bonds of the United States Steel Corporation, known as "ten-sixty-year five per cent sinking fund gold bonds," are redeemable at any time after ten years from date of issue at 110 per cent of their face value.[4] Their payment is provided for by a sinking fund, and they are payable in gold coin. Also, if not previously redeemed, they must be paid at the end of sixty years and bear 5 per cent annual interest. All this is indicated by the name.

1. *First Mortgage, etc., Bonds.* A real first mortgage or prior lien bond is one secured on property upon which no other bonds or similar obligations are secured. (See § 384.) Usually a first mortgage bond is a first lien on the property by which it is secured, though this is not invariably the case, as for instance, a builder's lien upon property covered by the deed of trust takes precedence over the bonds.

A number of bonds may be secured by the same property. In such case, the first issue is, as stated, a first mortgage bond or prior lien; the next, a second mortgage bond; the next, a

[4] This redemption at 110 is now generally understood to be obligatory, whether intentional or an error in drafting the mortgage by which the bonds are secured.

third mortgage bond, etc., the lien of each of these latter being inferior to that of the bond or bonds which precede it, but superior to that of the bond or bonds which follow.

As a matter of practice, however, bonds are rarely issued under the term of second mortgage, third mortgage, etc. A more euphemistic term is usually chosen, as general mortgage, refunding mortgage, consolidated mortgage, etc. The particular description used has no significance, as in some cases a general mortgage precedes a refunding mortgage and in other cases the reverse is true.

2. *Junior Lien, etc., Bonds.* A junior lien bond is one which comes after or is inferior to some other bond or bonds in its lien upon the property by which it is secured. Thus the lien of a second mortgage bond is a junior lien to that of the first mortgage bond.

When several different issues of bonds are secured by the same property, those having the superior lien are sometimes styled underlying bonds, the term indicating that they are closer to the property and have a superior claim. Thus, if first and second mortgage bonds are secured on the same property, the first mortgage bonds are underlying bonds. If third mortgage bonds are also issued, both first and second mortgage bonds are underlying bonds.

3. *Gold, etc., Bonds.* A bond may in express terms provide for payment in gold, silver, legal tender money, etc. Such provisions are legal and enforceable. If no medium is specified in which payment of a bond must be made, legal tender is always understood.

4. *Convertible Bonds.* A convertible bond is one which under prescribed conditions carries the right of conversion into other securities of the same corporation. The usual form of convertible bond is that which may be exchanged for common or preferred stock of the issuing corporation at a fixed rate of exchange and within a certain period.

It is obvious that the conversion privilege gives a bond a speculative character which adds greatly to its attractiveness as an investment. If the stock of the issuing company advances materially, the exchange can be made at a profit. If the stock does not advance, the bonds themselves are still a good investment. In short, the plan combines the safety of a bond investment with the profit possibilities of an investment in stock; but it must be borne in mind that the conversion privilege is usually given to a junior lien bond, the conversion privilege being intended to offset, in part at least, the bond's inferior lien.

5. *Income Bonds.* Income bonds—to which some prefix is frequently added—usually come into existence as a result of a reorganization where holders of bonds bearing a fixed rate of interest accept in exchange a bond whose interest is contingent on earnings. Income bonds vary in their nature materially. Usually they are an absolute junior mortgage on the property, but rarely a first lien, and occasionally they are mere debentures. Some carry cumulative interest, others do not. The security of the latter is precarious unless secured by an instrument that clearly defines just what is to be construed as net income applicable to interest payment. In general, the use of such bonds is unfortunate and the credit of the issuing company lower than if preferred stock were used.

As a rule, income bonds carry no voting power and the bondholders having acquired their security in exchange for an interest-bearing bond feel themselves in the position of creditors eager for their interest regardless of the advisability of payment from the company's standpoint, and the latter is equally eager to delay payment of interest until the general finances of the company are in good shape. Not infrequently the whole matter ends in court if the bondholders can find legal ground upon which to bring an action. The use of preferred stock would be better for all concerned, but bond-

holders will accept an income bond in a reorganization where they refuse preferred stock, hence the use of the bond.

6. *Collateral Trust Bonds.* A collateral trust bond is one which is secured by collateral—usually stocks and bonds of other corporations owned by the issuing corporation. These are deposited with a trustee under an agreement setting forth the conditions of the trust. (See § 383.)

7. *Guaranteed Bonds.* A guaranteed bond is one the payment of which, either as to interest or principal or both, has been guaranteed by some other corporation. Such a guarantee must be in writing and must either be written on the instrument itself or be attached to it to be effective.

Under proper conditions such guaranteed bonds are legal and are frequently issued. Thus, the bonds of a subsidiary road may be guaranteed by the parent road, or a bond of a component corporation may be guaranteed by the holding company or trust of which it forms a part. Guarantees are of doubtful value in most cases and, when trouble comes upon a property, the bondholders usually have to look to their real security rather than the guarantor.

8. *Terminal, etc., Bonds.* Terminal bonds are those issued by and secured on the property of a terminal company which is usually subsidiary to the railroad or steamship line using the terminal. Such bonds are usually issued for terminal purchases or improvements. Extension bonds are those issued by a railroad to extend its lines. Equipment bonds are those issued for equipment, usually by a railroad company, though they might be issued in connection with an industrial corporation. Construction bonds, as their name indicates, are those issued to secure money for the purposes of construction.

9. *Car Trust Bonds.* Car trust or equipment trust bonds or certificates are issued by a trustee who holds for their security equipment purchased or leased by a railroad company. The money realized from the sale of these bonds goes to the

manufacturers or vendors of the equipment, or the bonds may be turned over to them direct. The railroad company receives its equipment, subject to the trust agreement, and retires the equipment bonds in such amounts and at such periods as are fixed by the trust agreement. The title to the equipment does not usually vest in the railroad company until all the bonds are redeemed.

Bonds and notes of this character are usually issued in series and are redeemable in their serial order as payments are made by the railroad company. When the final payment is made by the railroad company, the deed of trust by which the property is held is released and the equipment becomes the property of the purchasing company.

10. *Purchase Money Bonds.* Purchase money bonds are those given to secure money for the purchase of the property by which they are secured.

§ 399. Short-Term Notes

A short-term note is merely a corporation's promissory note. (See Forms 163-166.) It may be secured or unsecured. If secured, it is usually by the deposit of collateral with a trustee under a trust agreement. The larger issues are generally in coupon form and differ but little from the usual bond, except in their early maturity.

Short-term notes are issued when the existing conditions are unfavorable for a long-time loan, and usually carry either a larger rate of interest than a bond issue or are sold at a discount that produces the same practical result. Short-term notes are usually floated with the expectation that they will either be retired at maturity or will be taken up by a bond issue on more favorable terms than would have been possible at the time the notes were issued.

BOOK IV

SPECIAL CORPORATE TOPICS

Part XII—Corporate Arrangements

CHAPTER LII

VOTING TRUSTS

§ 400. General

It is frequently necessary or important that the agreed management of a corporation be preserved consecutively for a term of years. This may be for the protection of minority or special interests, or to maintain a control satisfactory to the majority as then existing, or in pursuance of organization agreements, or in accordance with the terms of a reorganization or consolidation. In any such case the voting trust—sometimes called a "stock pool"—is the usual means by which this is secured.

The voting trust is an arrangement under which sufficient stock to insure the desired ends is placed in the hands of trustees for some certain period of time with definite instructions as to the way in which this stock shall be voted. Other features may enter in, as provisions to prevent the alienation of the stock held by these trustees, and for special dispositions of the dividends thereon, etc., but these are inconsiderable and the designated exercise of the voting power of the trusteed stock for the given period is the main end sought.[1] (See Chapter LII, "Voting Trust Forms.")

It is to be noted that the objects attained by the voting trust can be secured more permanently by the formation of a "holding corporation," where this is permissible. (See Chapter LIII, "Holding Corporations.")

[1] See Knickerbocker Inv. Co. v. Voorhees, 100 App. Div. (N. Y.) 414 (1905).

§ 401. Distinctions

The voting trust as here considered applies only to the stock of a single corporation and must be distinguished from the voting trust arrangement under which attempts were formerly made to combine a number of corporations under one management. That system was legally unsound and has been abandoned. Neither has a voting trust any necessary connection with restrictions on the sale of stock. Provisions restricting the sale of stock for a specified period or to anyone not embraced in the agreement may be included, but the voting restrictions are the main end of the trust and these others are merely incidental.

§ 402. How Formed

A voting trust is formed by placing in the hands of trustees such proportion of the stock of the particular corporation as may be necessary to secure the desired control. These trustees act under, and their powers are defined by, an agreement, styled the voting trust agreement, subscribed to by all the parties entering the trust. (See Form 27.) This agreement specifies the length of time for which the stock is to be held and the manner in which it is to be voted at the annual election of directors. If the management then in power is to be retained, the trustees would be instructed to cast the vote of the trusteed stock in all elections of directors for the parties then constituting the board, suitable provision being made in case of the possible death of any of the directors named. If the object of the trust were to insure minority representation on the board, the trustees would be instructed to cast the trustee vote for directors in favor of parties named by the designated minority interests up to a specified number, the other members of the board being named by the majority interests. Or if the object of the trust were to secure an efficient and non-partisan board, the trustees might be instructed

merely to cast the vote of the stock held by them for such persons as in their judgment would be suitable and acceptable to the interests involved. The trust agreement might also provide the manner in which the trustees' stock is to be voted in matters of general interest, or it might be forbidden to vote on these matters, or its vote under such circumstances might be left to the discretion of the trustees.

Whatever the instructions, the stock must be voted as a unit by the trustees, in accordance therewith, and, provided the conditions of the trust be proper, in any case of refusal so to vote, the courts will enforce compliance.

The stock included in a voting trust is actually transferred to the trustees and is by them taken out in their own names. Trustees' receipts are given to the parties depositing stock, these receipts being negotiable in form and representing the equitable ownership of the stock held in the trust.

The trustees are authorized to collect and receive any dividends and profits accruing on the stock held by them, but must pay over the same in due proportion to the equitable owners of the trusteed stock. Often the trustees, for purposes of convenience, direct the corporation to pay the dividends to the holders of the trust certificates.

The trust agreement also provides the method of dissolution of the trust upon the expiration of the specified time limit, and any other desired features or details. In order to avoid any possibly illegal suspension of the rights of alienation in the stock held in trust, the agreement may provide that at any time, by consent of all the parties in interest, the trust may be terminated.[2]

When it is desired to control but a single election, the use of proxies is the most convenient method by which this may be accomplished. These, being revocable and of limited duration, are not available for more permanent purposes.

[2] Williams v. Montgomery, 148 N. Y. 519 (1896).

§ 403. Legal Status

New York and Maryland are the only states in the Union in which the voting trust is expressly sanctioned by statute. In New York this was done in 1901, when an amendment to the General Corporation Law was passed, providing:

"A stockholder may by agreement in writing, transfer his stock to any person or persons for the purpose of vesting in him, or them the right to vote thereon for a time not exceeding five years upon terms and conditions stated, pursuant to which such person or persons shall act; every other stockholder, upon his request therefor, may, by a like agreement in writing, also transfer his stock to the same person or persons and thereupon may participate in the terms, conditions and privileges of such agreement; the certificates of stock so transferred shall be surrendered and canceled and certificates therefor issued to such transferee or transferees . . . ."[3]

The Maryland statute was passed in 1908 and follows the New York statute.[4]

Under these statutes a duplicate of the voting trust agreement must be kept on file in the principal business office of the corporation, open to the inspection of any stockholder during business hours.

Prior to the passage of the statute, voting trusts existed in New York and were regarded favorably by the courts. Since its passage, the conditions prescribed by the statute would probably have to be followed in detail to establish an enforceable trust.

In New Jersey, Massachusetts, California, Alabama, and other states,[5] although no statutes on this subject exist, the courts have rendered decisions favoring similar arrangements

[3] Gen. Corp. Law (N. Y.), § 25.
[4] Md. Code, Art. 23, § 102.
[5] Chapman v. Bates, 61 N. J. Eq., 658 (1900); Brightman v. Bates, 175 Mass., 105 (1900); Whitehead v. Sweet, 126 Cal., 67 (1899); Mobile, etc., Co. v. Nicholas, 98 Ala. 92 (1893); Venner v. Chicago City Ry. Co., 258 Ill. 523 (1913).

and intimating that where the trust was for a proper purpose and for a reasonable time, and did not contemplate any advantage from which other stockholders of the same corporation were excluded, it was not contrary to any principles of law or equity. It is probable that a voting trust, reasonable as to its duration and equitable as to its purposes, would be sustained in any state of the Union.

§ 404. Illegal Voting Trusts

The primary requisite of a legally defensible and enforceable voting trust is an object not illegal in itself, or calculated to injure or discriminate against other stockholders of the same corporation. The voting trust must also be reasonable as to its duration and terms, and its possible advantages should be open to all stockholders of the particular corporation.

Any voting trust formed to promote a monopoly, or to dominate the corporation in the interests of another corporation, or to deprive other stockholders of any of their rightful powers, would undoubtedly be held illegal.

§ 405. Restriction of Stock Sales

The voting trust as a means of restricting the sales of the stock held under its provisions is of doubtful efficacy. It unquestionably prevents the transfer of the actual stock during the life of the trust, and thereby prevents the transfer of any of the stockholders' rights that would accompany delivery of the stock. On the other hand, the trustees' receipts, or certificates, are transferable, and if the object of restricting the sale is to maintain the market price of the stock, or to give preference to the sale of treasury or other special stock, the sale of the trustees' certificates might interfere with these purposes almost as effectually as would the sale of the stock itself.

CHAPTER LIII

HOLDING CORPORATIONS

§ 406. General

A holding corporation in the modern sense of the term is a corporation formed for the express purpose of controlling other corporations by the ownership of a majority of their stock.

"The advantages of a holding corporation may be enumerated as follows:

"1. It furnishes a readily available and effective method of controlling several corporations for a common object.

"2. It may be employed to perpetuate corporate control. Financiers holding the control of corporations may transfer their shares to a holding corporation. Death or disagreement will not then affect the control. In many cases also a holding corporation may take the place of a voting trust, which always is limited as to time.

"3. The holding corporation permits the capitalization of controlling stock interests. The control of a corporation having a capital of twenty million dollars—as an illustration—requires a permanent investment of more than ten million dollars, assuming the stock worth par. If a holding corporation is formed with a capital equal to the investment, the shares may be transferred to it and forty-nine per cent of its stock sold. The original controlling stockholders, by retaining control of the holding corporation, retain control of the original corporation."[1]

[1] Noyes on Intercorporate Relations, § 285.

Under the common law, which did not permit one corporation to invest in the stock of another, holding corporations were impossible, and any attempt of a corporation to control another corporation by holding a majority of its stock would have been held *ultra vires*.[2]

"But as the powers of corporations, created by legislative act, are limited to such as the act expressly confers, and the enumeration of these implies the exclusion of all others, it follows that, unless express permission be given to do so, it is not within the general powers of a corporation to purchase the stock of other corporations for the purpose of controlling their management."[3]

The common law rule has, however, been gradually relaxed and set aside until now the purchase of stocks by a corporation may be provided for in most states of the Union.

Corporations have certain incidental powers of acquiring and holding stock, as discussed in the section which follows. The general right to purchase and hold the stock of other corporations, under which the holding corporation is possible, is, however, derived from legislative enactment, either by virtue of statutes expressly conferring on specific corporations the power to buy and hold the stocks of other corporations, or, in a few states, under the operation of statutes permitting the formation of corporations for any legitimate purpose.[4]

§ 407. Incidental Powers to Hold Stock

In many cases corporations have power to take and hold stock in other corporations as a power incidental to their main purpose. For instance, certain corporations, like the great insurance companies which in the regular course of business have large sums for investment, are very properly allowed to

[2] Noyes on Intercorporate Relations, §§ 264, 274; People v. Pullman Co., 175 Ill. 125 (1898); 64 L. R. A. 366; People v. Chicago Trust Co., 130 Ill. 268 (1889); Hyams v. C. & H. Mining Co., 221 Fed. 529, 537 (1915).

[3] De La Vergne Co. v. Savings Institution, 175 U. S. 40, 54 (1899).

[4] Dittman v. Distilling Co., 64 N. J. Eq. 537 (1903); Market St. Ry. Co. v. Hellman, 109 Cal. 571 (1895).

invest these in safe stocks. Also in almost all cases corporations are allowed to take corporate stock to save a debt. They may also take stock as collateral to secure an obligation, which in the usual course of business may bring about their ownership of such collateral.

Where a corporation may lawfully consolidate with another corporation, it may acquire the stock of this other corporation as a proper step to such consolidation. Also in some cases it has been held that a corporation may take stock in another corporation when this other corporation will promote some of its specified purposes, as when a street car company takes stock in a hotel or amusement park on or near its lines, or a manufacturing company takes stock in a power development company from which it will obtain power.

§ 408. Authorization to Hold Stock

New Jersey was the first state to enact statutes specifically empowering corporations organized under its laws to hold the stock of other corporations. This law was adopted in the year 1888, and reads as follows:

"Any corporation may purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of the shares of the capital stock of, or any bond, securities, or evidences of indebtedness created by any other corporation or corporations of this or any other state, and while owner of such stock may exercise all the rights, powers and privileges of ownership, including the right to vote thereon."[5]

The enactment of this law by New Jersey paved the way for the great industrial combinations. Theretofore they had been attempted by the appointment of a board of trustees in whose hands was placed a majority of the stock of the corporation to be controlled, these trustees then electing boards of directors who managed their respective corporations in

[5] See Gen. Corp. Law of New Jersey, § 51.

the common interest. This arrangement was declared illegal and was abandoned for the holding corporation under the New Jersey law.[6] Recent federal decisions declaring certain of these holding corporations illegal are not directed against the laws under which they were formed, but against the purposes of the corporations. (See § 411.)

Later statutes in New Jersey have limited the broad powers given in 1888. Under the present law the purchase by a corporation of the stock or securities of another corporation is limited to a purchase "solely for investment, and not using the same by voting or otherwise to restrain trade or to bring about, or in attempting to bring about, the substantial lessening of competition." The statute insures to corporations the usual incidental powers to hold stock of other corporations.[7]

Delaware and Maine have enacted statutes similar to the earlier statute of New Jersey giving corporations the unlimited power to buy, hold, and sell stocks, and in New York these privileges may be enjoyed if so provided in the charter. Under the Maine statute it has been held that a corporation organized under the law regulating the incorporation of general business corporations, could not acquire stock in companies organized to do insurance business, thus doing indirectly what it could not do directly.[8]

§ 409. What Holdings Carry Control

Contrary to popular opinion it is rarely necessary to hold 51 per cent of the outstanding stock of a corporation in order to elect a majority of the directors, and through them to elect the officers and control the corporation. Where all the stock is held in a few hands, as in a close corporation, the case is different, but even here anyone holding or controlling half

[6] State v. Standard Oil Co., 49 Ohio St. 137 (1892); People v. North River Sugar Refining Co., 121 N. Y. 582 (1890).
[7] N. J. L. 1915, Ch. 114.
[8] Central Life Securities Co. v. Smith, 236 Fed. 170 (1916).

the stock can, if he once obtains a majority of the board, hold his control indefinitely. A majority against him cannot be obtained, and if a deadlock should arise over the election of directors, no new directors could be elected without his consent, and his directors, already in office, would hold over until some agreement satisfactory to him was reached.

With the usual corporation with scattered holdings, a much smaller proportion than half the stock is sufficient to control. In an action under the Sherman Anti-Trust Act, the Supreme Court held that the purchase of 46 per cent of the stock of a competing railroad was ample to control its operations, thereby effecting a combination in restraint of trade.[9]

"The president of one of the largest railroad systems in the United States is authority for the statement that 33 per cent of the stock which has voting power is sufficient to control any important railway, always excepting instances where great blocks of stock are centralized in a few hands. He added that those in control of a property could always count upon a large proportion of the stockholders supporting them as a matter of course, because such holders were too weak or too lazy to engage in any independent movement of their own.

"In the case of banks and trust companies, 33 per cent holdings are nearly always sufficient to protect an existing management. That is the basis usually followed by new interests in attempting to buy up properties, and with the trust companies especially such holdings have almost invariably been sufficient to force recognition from an unwilling management. One bank president of this city has been known to own personally 40 per cent of the stock of his own bank, which was unusually heavily capitalized. With such holdings and those of his friends, the present owners could not pos-

[9] United States v. Union Pac. R. R. Co., 226 U. S. 61, 96 (1912).

sibly be dislodged. The president of another bank, following a different method, has taken care to see that its stock is distributed as widely as possible, so that today, with a comparatively small capitalization, the bank is owned by at least two thousand different stockholders, who could hardly be combined against the management."[10]

It is reported that when the control of the Western Union Telegraph Company passed to the Bell Telephone interests, it was accomplished by the transfer of but 20 per cent of the outstanding stock.

§ 410. Its Function In Industrial Combination

At one time the holding corporation occupied a position of great importance, being the means by which many of the great industrial combinations were effected and controlled. Sometimes these corporations were confined strictly to the function of holding companies, as was the case with the Northern Securities Company which was formed for the sole purpose of holding sufficient stock of the Great Northern Railway Company and the Northern Pacific Railway Company to control the two corporations and combine their interests. Usually, however, such a corporation was given, in addition, ample powers to carry on directly any business or industry in the line of the proposed combination. Then it could operate by controlling the majority of the stock of its component corporations, or by buying up the manufacturing plants engaged in the particular industry, or by initiating new industrial operations on its own account, or by doing all of these things.

As already suggested, the holding corporation itself could be controlled by the ownership of but 50 or 51 per cent of its stock, and so long as the parties in control hold this amount, they could part with any additional stock without interfering

[10] Editorial *New York Evening Post.*

with their control of the holding corporation and through it of the subsidiary corporations. This device made it possible for those who were on the inside to control much capital with a comparatively small investment on their own part.[11]

§ 411. Limitations on Use of Holding Companies

The holding corporation is the instrument by which most of the great industrial combinations have been effected, and has been generally recognized as the proper legal means to this end. Most of the great industrial combinations and many of the smaller ones have, however, come to grief through the enforcement of the Sherman Anti-Trust Law.

At the present time a holding company organized in one state may control corporations organized under the laws of other states.[12] It is within the power of any state objecting to this, to pass laws to prevent foreign holding corporations from controlling corporations formed under the laws of such states. With a view to simplifying corporate relations, it is probable that such action on the part of the states would be of advantage. The same end might be achieved by means of a statute denying the right to vote at corporate elections to all stock except that owned by natural persons in their own right. This would effectually prevent the operation of the holding corporation.

In the Northern Securities case, the United States courts held the attempt to prevent competition between two opposing interstate railways by means of a holding corporation illegal.[13] In the famous cases against the Standard Oil Company and the American Tobacco Company the Supreme Court put a final quietus on the use of holding companies as

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[11] See 1 Cook on Corp., § 317; Noyes on Intercorporate Relations, § 285 *et seq.*; Robotham v. Prudential Insurance Co., 64 N. J. Eq. 673 (1903).

[12] Island Heights, etc., Co. v. Brooks & Brooks, 88 N. J. L. 613 (1916); *contra*, Central L. S. Co. v. Smith, 236 Fed. 170, 176 (1916).

[13] See Northern Securities Co. v. United States, 193 U. S. 197 (1904).

a means of controlling competing companies where such control resulted in a violation of the Sherman Anti-Trust Law.[14]

The Clayton Act of October 15, 1914, makes the law very specific as to corporations engaged in interstate commerce, and forbids the acquisition by one corporation of the whole or any part of the stock of another corporation, "where the effect may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

In a remarkable case in New Jersey,[15] minority stockholders sought to enjoin the directors of the Prudential Life Insurance Company from carrying out an arrangement by which the Fidelity Trust Company was to control the Prudential Company and the Prudential Company in its turn was to control the Fidelity Trust Company. Under this plan at the next ensuing election, which was that of the Trust Company, the Prudential directors, voting a majority of its stock, would have put themselves in charge of the affairs of the Trust Company. Then when the time came for the Prudential election, these same directors, exercising the Trust Company control, would in like manner have put themselves in charge of its affairs, and thereafter the interlocking board thus formed would have been self-perpetuating, and the enormous assets of the Prudential Insurance would have been controlled by the board in perpetuity.

In the course of his argument counsel for the directors asserted that under the laws of New Jersey the following plan would be entirely legal:

"One man controls a company of $10,000,000 capital. He may form a new company with a capital of $5,100,000 to

[14] Standard Oil Co. v. United States, 221 U. S. 1 (1911); United States v. American Tobacco Co., 221 U. S. 106 (1911).
[15] Robotham v. Prudential Insurance Co., 64 N. J. Eq. 673 (1903).

hold a majority of the stock. He may then sell all but $2,600,000 of the stock in company No. 2 and transfer his remaining stock to a new company with a capital of $2,600,000. He may then sell to company No. 3 all but $1,400,000 and transfer that to a new company. This process may go on until the power of the whole chain of corporations is vested in the holder of a few thousand dollars of stock in the ultimate company, and the same chain can be used for an unlimited number of companies."

Vice-Chancellor Stevenson, before whom the case was heard, apparently did not sympathize with this view of the possibilities of holding companies under the New Jersey law, and expressed his views with some emphasis. The court also granted the injunction asked for, thereby indicating that the mutual control of each other by two corporations is not under existing laws a legal possibility.

In any case of abuse of power by means of a holding corporation, the courts would undoubtedly afford relief.[16]

§ 412. Parent Companies

A useful variant of the holding company is frequently employed with advantage in the exploitation of inventions. A parent corporation, in which the patent rights for such inventions are vested, is formed in some selected state where the power to hold the stock of other corporations may be had. Subordinate companies are then formed in the several states or other territorial districts, and to these companies rights in the invention are assigned for their respective districts, the parent company usually reserving or acquiring a controlling interest in each subordinate company. The patent rights may be sold to the sub-companies absolutely, or with reservation of royalties, or perhaps a mere license may be issued. The

[16] See Farmers' Loan & Trust Co. v. N. Y., etc., R. Co., 150 N. Y. 410 (1896); Niles v. N. Y. C. & H. R. R. Co., 69 App. Div. (N. Y.) 144 (1902); *contra* Windmuller v. Distilling Co., 114 Fed. 491 (1902).

subordinate company then operates in its own territory as an independent company but under the general direction of the parent company, this direction becoming immediate and absolute in case of necessity.

Under this plan the parent corporation makes certain the proper fulfilment of its contracts with the subordinate companies, and also insures the proper and harmonious conduct of the general business.[17]

[17] For a discussion of this subject see People v. Am. Bell Telephone Co., 117 N. Y. 241 (1889).

CHAPTER LIV

CONCERNING PROMOTERS

§ 413. The Promoter's Function

A promoter, as considered here, is one who actively engages in the financing and organization of an enterprise under the corporate form. The term is described by an English authority as a "short and convenient way for designating those who set in action the machinery by which the Act enables them to create a corporation." Cook briefly classifies the promoter as a "person who brings about the incorporation and organization of a corporation."[1]

Another idea enters into the modern everyday business use of the term. The promoter's activity and interest in the affairs of the enterprise are incited by the expectation of special profits. If he does not realize or expect to realize special profits out of the undertaking, he is not, in modern parlance, a promoter, though filling every requirement of the legal definition.

In the organization of most modern corporations the promoter plays an active and very important part. His anticipated special profits from these efforts are usually large and not infrequently excessive. His arrangements whereby these special profits are to be secured have given rise to a class of cases turning solely upon the relations existing between the promoter, his associates, and the corporation. The ideal of the law in regard to these relations is high. It is to be re-

[1] 3 Cook on Corp., § 651; Dickerman v. Northern Trust Co., 176 U. S. 181, 203, (1899); Armstrong v. Sun Printing, etc., Assn., 137 A. D. (N. Y.) 830 (1910); Arnold v. Searing, 78 N. J. Eq. 146 (1910).

gretted that the methods of promoters are usually on a much lower level.

§ 414. Promoter's Relation to Corporation

For the purposes of the present consideration the promoter is one who concerns himself in the financing and organization of a corporation with a view of realizing special profits. In a large proportion if not the majority of such cases, the promoter has brought about the organization of the corporation for the express purpose of securing these special profits. There is no intrinsic iniquity or injustice in so doing. The only question is as to the propriety and legality of his arrangements for their collection. Too frequently the methods of the promoter are not only of doubtful moral status, but directly in conflict with the established law.

The relation of the promoter both to the corporation and to those associated with him in its organization is one of trust. He is guiding the affairs of the incipient corporation and is supposed to be safeguarding its interests as he would his own.

As stated in Old Dominion Copper Co. v. Bigelow, 203 Mass. 159, 187 (1909), quoting in part from an earlier case: "Promoters have in their hands the creation and moulding of the company: they have the power of defining how, and when, and in what shape and under what supervision, it shall start into existence and begin business. The corporation is in the hands of the promoter like clay in the hands of the potter. It is to this person, absolutely helpless and incapable of independent initiative or uncontrolled action, that the promoter stands as trustee."

This doctrine is too clearly established to be questioned. The confidential relations of the promoter being admitted, it follows, then, that while he may with entire propriety profit by his connection with the corporation, such profit must be of such a nature as is compatible with confidential relations.

§ 415. Illegal Arrangements

"Corporations can be formed through irresponsible agents with ease. If these agents can vote away a substantial part of the capital stock for property of comparatively small value, and still with immunity to themselves and their principals receive from the uninformed public cash subscriptions for the rest of the capital stock, the organization and management of corporations might readily become a 'system of frauds.' "[2]

The usual mistake of the promoter is in dealing with the corporation as he would with a stranger. Unreasonable or even large profits are difficult of attainment if the party from whom they are to be drawn is informed as to the facts, and for this reason the promoter wishing to sell property to the corporation usually conceals or, worse still, misrepresents its real cost. If the property were actually owned by the promoter and had been so owned before the organization of the corporation was undertaken, the promoter's status would be different. Then there would ordinarily be no compulsion upon him to reveal the cost of the property and he might sell it to the corporation at any agreed price and, in the absence of misrepresentation, without fear of legal consequences.

Usually, however, the promoter does not own the property taken over by the corporation, but either holds it under option or is acting in the interests of the real owner, who pays him a percentage of the price secured, or allows him to offer it to the corporation at an advanced price, protecting the promoter in all excess over the real price to the owner. When the promoter occupies this position, he is in conflict with the law, for it has been laid down clearly and unmistakably that a promoter must not make any secret profit out of his corporation, or out of those associated with himself in the formation of the corporation.

"It is well settled that they will not be permitted to take

[2] Old Dom. Copper Co. v. Bigelow, 203 Mass. 159, 188 (1909).

advantage of their position in order to make a secret profit out of their transactions on behalf of the proposed corporation or of the corporators or out of their dealings with the corporation or corporators." [3]

The leading case on this subject is that of Erlanger v. New Sombrero Phosphate Co., 5 Ch. Div. 73; affirmed in 3 App. Cases 1218 (1878). This is an English case, but its doctrines have been generally followed in this country. Erlanger and his associates formed a syndicate to purchase an island containing phosphate which was offered to them for £55,000. Through agents a company was then formed, Erlanger naming the five directors. Of these, two were at the time out of the country. Of the three remaining, one was Erlanger's private agent, one was Lord Mayor of London, and the third was a Rear Admiral of the British Navy. These two latter were not interested in any way with Erlanger in the sale of the island to the corporation, were not informed as to the circumstances and did not make any inquiry, but, acting with the Erlanger director, accepted Erlanger's proposition to sell the island to the corporation for £80,000 in cash and £30,000 in shares. Stock in the corporation was then sold until some 400 shareholders were interested in the company. Later these secured control of the company, and, having discovered the facts as to the sale of the island, promptly brought suit against all parties concerned in its sale to the company. As a result, the sale was ordered rescinded and the vendors were ordered to return the price of the island to the company, upon which the island was to be restored. This decision was affirmed upon appeal. The Lord Chancellor, in rendering the decision, said (at page 1236):

"I do not say that the owner of property might not promote and form a joint-stock company, and then sell his property to it, but I do say that if he does he is bound to take care

[3] 1 Clark & Marshall on Corp., § 110b.

that he sells it to the company through the medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person."

The doctrine of the case was, first, that independent directors should have been named; and second, that the promoters should have made full disclosure to these directors of all material facts. In the decision it was intimated that if one director personally beyond suspicion had known and approved the real facts as to the increased price, it might have been sufficient to validate the sale.

The doctrine in this country seems to be similar. When property is taken by promoters for the purpose of sale to the corporation, whether by purchase, option, or agreement, they are bound to disclose any private bargain or secret profits. The relations are confidential and each person is bound, as in partnership, to act with entire openness and fairness to those with whom he is associated. The law as to this is very clear and has been passed upon again and again. As stated in Densmore v. Densmore, 64 Pa. St. 43 (1870):

"Where persons form such an association, or begin or start the project of one, from that time they do stand in a confidential relation to each other, and to all others who may subsequently become members or subscribers, and it is not competent for any of them to purchase property for the purposes of such company, and then sell it at an advance without a full disclosure of the facts."

From the cases cited and the additional cases given hereafter, it will be seen that any special profits made by the promoter are illegal unless made with the full knowledge of all the others interested, or with the consent of an independent and fully informed board of directors, or with disclosure of the conditions to those who are asked to subscribe to the

stock.[4] If special profits are made otherwise, suit for redress may be brought at any subsequent time by the corporation, or, under some circumstances, by the stockholders who have contributed to the promoter's improper profits by the purchase of stock on its first issue, or of treasury stock thereafter.

It is to be noted that purchasers of stock from other stockholders do not have a right to any such redress.

"A purchaser of shares in an existing corporation from a stockholder, has no interest in the application of the money which he pays for the shares, but it is quite different with one who agrees to subscribe for shares in a corporation to be created."[5]

These cases where suit is brought for the restoration of promoters' profits must not be confused with that other class in which recovery is had by *creditors* because of the overvaluation of property turned into the corporation in exchange for stock, or bonds, or both. The two cases often go together, but are radically different in their nature. An improper profit to promoters might exist without any overvaluation, and an overvaluation might exist without any improper profits to the promoters. For instance, property at an overvaluation might be accepted by the corporation and its stockholders with a full knowledge of the promoters' profits. They would then have no basis for proceedings against the promoters. A creditor might, however, in such case proceed against the stockholders on the ground of an overvaluation. On the other hand, the property might be put into the corporation at a fair figure, but the promoters receive a secret commission, or rebate or other improper profit on the sale. In such case there

[4] Fred Macey Co. v. Macey, 143 Mich. 138 (1906); s. c., 152 Mich. 164 (1908); Telegraph v. Loetscher, 127 Iowa 383 (1904); Hinckley v. Oil & Pipe Line Co., 132 Iowa 396 (1906); Miss. Lumber Co. v. Joice, 176 Ill. App. 110 (1912); Lomita Land & Water Co. v. Robinson, 154 Cal. 36 (1908).

[5] Walker v. Anglo-Am. M. & T. Co., 72 Hun 334, 341 (1893); Twycross v. Grant, 2 C. P. Div. 469, 483 (1877).

would be good grounds for proceeding against the promoters for the recovery of the improperly gotten profits.

In the various states the decisions in regard to promoters' profits vary in their tenor, but there is a general trend toward a stricter construction of the promoter's duty and responsibility to his corporation.[6]

§ 416. Legitimate Arrangements

The laws are very clear in their denunciation of the promoter's secret profits. They are hardly less explicit in their recognition of the promoter's right to profits if secured and taken under proper conditions. In 1 Morawetz on Private Corporations, § 293, it is said:

"However, there is no rule of law prohibiting a person from forming a corporation for the purpose of selling property to it and making a profit from the sale. The law merely requires that such a transaction be entirely open and free from deception upon the company and those who become members."

In Plaquemines Tropical Fruit Co. v. Buck, 52 N. J. Eq. 219, 230 (1893), following the case of Erlanger v. N. S. P. Co., already quoted from, the court said:

"Buck, as the promoter of the corporation, stood in a fiduciary relation to the company as soon as it was organized. As such promoter, it was open to him to sell property which he owned, to the company, on making full and fair disclosure of his interest and position with respect to that property. Not only was such disclosure necessary, but it was incumbent on him, as sole promoter of the company, formed to purchase this specific property, controlling and moulding its organization, to furnish it with an executive or board of directors capable

[6] Hayward v. Leeson, 176 Mass. 310 (1900); Old Dominion Copper Co. v. Bigelow, 188 Mass. 315 (1905); s. c., 203 Mass. 159 (1909); See v. Heppenheimer, 69 N. J. Eq. 36 (1905); Arnold v. Searing, 78 N. J. Eq. 146 (1910); Bigelow v. Old Dominion Copper Co., 74 N. J. Eq. 457 (1908); Manning v. Berdan, 138 Fed., 159 (1905); Lomita Land Co. v. Robinson, 154 Cal. 36 (1908); Mason v. Carrothers, 105 Me. 392 (1909).

of forming competent and impartial judgment as to the wisdom of the purchase and the price to be paid."

To summarize, it seems very clear that the promoter is well within his rights when he organizes a corporation to purchase his own property, provided that such purchase is directed by an independent board capable of impartial judgment as to the value of the property and the advisability of its purchase by the corporation, and that such purchase is made with full knowledge of the fact that the property in question belongs to the promoter.

In all such cases the promoter, having purchased or otherwise acquired the property in question before the inception of the corporation, was not and could not in any way have been acting as the agent or trustee of the corporation when he purchased the property. He may therefore have acquired it at any price or in any way, and, when later the corporation is organized, he is at liberty to offer his property to the corporation at any advanced, or different price he may choose, without divulging the profits to be made thereby. The one essential is that the promoter's interest in the property shall be disclosed, and that such offering shall be absolutely without misrepresentation. If he represents that the property is owned by him when held only by option, or that it is turned in to the corporation at the cost to him when he is really making a profit, such misrepresentations are, under the circumstances, material and render the promoter liable for the secret profits so secured. Without such misrepresentation, however, he may make what profit he will.

In Parsons v. Hayes, 14 Abb. N. C. (N. Y.) 419 (1883), property was turned in at a gross overvaluation, but the only persons in interest were informed of all details and did not object; therefore the promoters were held to be within their rights and the contract not subject to rescission.

Also in Tompkins v. Sperry, Jones & Co., 96 Md. 560

(1903), a receiver attempted to hold the promoters responsible under the same circumstances, but his application was denied on the ground that there was no concealment and therefore no wrong.[7]

From this it would appear that, if with the full knowledge of all concerned as to the circumstances thereof, a corporation is organized and property is exchanged for a portion or the whole of its stock, the completed transaction has harmed no one, is absolutely legal, and is not open to later objection by any of the parties consenting thereto. The promoters may make such profits as they please, provided the other participating parties consent thereto, and up to this point the transaction is legitimate and unobjectionable.[8]

Nor, if the price paid for the property taken was within reason, or capable of justification, is there danger of any subsequent objection, no matter what profit may have been made by the promoters. Nor, even if the price and profits were entirely out of reason and totally unjustifiable, is there any danger of adverse legal action if creditors and subsequent stockholders are informed as to the conditions before they give credit to the corporation or invest in its securities.

If, however, the promoters' profits are excessive or unreasonable, and stock is sold or obligations contracted by the corporation without proper publicity as to the basis of credit or stock value, a cause of action may accrue either against those who originally transferred the overvalued property to the corporation, or against the holders of the stock which, as shown by results, was not full-paid. This would, however, be a matter only of overvaluation, the profits received by promoters being merely an incident and not the point at issue.[9]

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[7] See also Seymour v. Spring Forest Cemetery Assn., 144 N. Y. 333 (1895); and Blum v. Whitney, 185 N. Y. 232 (1906).
[8] The Insurance Press v. Montauk, etc., Co., 103 App. Div. (N. Y.) 472 (1905).
[9] Salomon v. Salomon & Co., App. Cases 22 (1897).

§ 417. Incidental Liabilities of Promoter and Corporation

The relations between associated promoters will be determined by their agreements. In the absence of any agreement to the contrary, one promoter may require contributions from his associates for any expenses or outlay incurred in connection with their undertaking.

Promoters receiving subscriptions for the stock of a corporation to be organized by them, are responsible to the subscribers for the amounts received if they fail to complete the organization.

If promoters perform services and incur expenses in procuring subscriptions, or in doing things for the benefit of the prospective corporation, the corporation when organized cannot be held responsible for such expenses and services, unless it expressly undertakes to assume them. If it does assume them, the benefits received by the corporation from such acts and expenditures will be deemed sufficient consideration to support such assumption.

Contracts and agreements made for a corporation before its organization by a promoter do not bind it, unless the corporation accepts the same, either by express action, or impliedly, by taking the benefit of such contracts and agreements.

A promoter entering into a contract on behalf of a corporation to be formed, will himself be liable on such a contract unless it is expressly understood that the other party to the contract is to look to the corporation alone.

An agreement by a promoter with the vendor of property to the promoter's corporation, for a private commission, or the excess obtained over a specified price, such payment or profit being unknown to the corporation, is contrary to public policy and illegal and the promoter could not maintain an action to recover. This comes under the general head of secret profits.

§ 418. Restrictions on Sale of Stock

When a corporation is organized and a large amount of stock is turned over to the promoters in payment for property, it is often desirable to restrict the sale of this outstanding stock for a limited period, in order to permit the prior sale of treasury stock, or to obtain other ends. This is sometimes effected by placing such stock in a voting trust for a specified period. The protection here from a sale of the stock is, however, but partial, as the trustees' certificates might still be sold and interfere with the purposes of the restrictions; but a voting trust may be effective to keep the control of the corporation in the promoter's hands.[10]

In New York the desired end may be attained by actual withdrawal of the stock, as it has been decided that promoters, by agreement, may deposit their certificates of stock with a trust company, not to be withdrawn therefrom or sold for a specified period unless by mutual consent.[11]

Another method, practicable in New York at least, is for the stockholders to associate themselves and have their stock issued to them jointly, with an agreement that such certificates shall not be changed, sold, or pledged for some reasonable, specified period, except upon consent of all interested. Such an arrangement for a period of ten years was upheld in Hey v. Dolphin, 92 Hun (N. Y.) 230 (1895). In this case the contract was practically one of partnership in the stock for the designated period. A power of attorney given one of the partners to vote upon this stock was held to be irrevocable.

If another method of restricting the sale of stock is desired, it would probably be practicable, all parties consenting, to make a valid agreement to which the corporation would be a party, providing that certificates for certain stock should not

[10] Gray v. Bloomington & N. Ry., 120 Ill. App. 159 (1905).
[11] See Williams v. Montgomery, 148 N. Y. 519 (1896).

be issued to those entitled to them, unless by mutual agreement, until a certain specified time or until a stated proportion of treasury stock had been sold.

Generally, however, courts do not favor agreements suspending or restricting the right of alienation of stock, such agreements being usually held contrary to public policy and void.[12] (See § 405.)

§ 419. Underwriting

When any very large or important enterprise is to be incorporated and financed, it is customary to underwrite the corporate securities before they are offered at public sale. This practice was particularly characteristic of the organization of the industrial combinations, their securities, almost without exception, having been underwritten before they were placed on the market.

Underwriting is not an agreement to guarantee the sale of particular stock or bonds underwritten, though it insures their sale at a specified minimum price. It is in fact a conditional subscription for such securities, the underwriters obligating themselves to buy at a specified price all of the underwritten securities not sold at a higher specified price before a fixed date or within a certain time after the underwriting. The inducement to the underwriters is a portion or even the whole of the advanced price at which it is to be offered to the public. A stock bonus is often given the underwriters in addition to, or in lieu of, the cash profits.

It is obvious that only men of financial responsibility can successfully engage in underwriting and that the enterprise underwritten must be itself sound and reputable.

Common stock, preferred stock, or bonds may be underwritten, though usually only the latter two are utilized for this purpose. An underwriting agreement is in form a sub-

[12] Brown v. Britton, 41 App. Div. (N. Y.) 57 (1899).

scription to the stock or bonds involved, the body of the agreement stating in detail the terms and conditions under which the subscription is made. It is usually provided that the instrument is to go into effect when a certain minimum amount has been underwritten. The underwriters may, if necessary, advance cash on the underwriting, or advances may be secured from trust companies or other financial institutions on the credit of the underwriting.

The advantages of a substantial underwriting are material. The success of the flotation is assured from the first and the managers are relieved of care concerning the matter. If funds are required immediately, advances can be secured. The underwriting is a guarantee of the soundness of the enterprise by responsible people, and this fact gives weight and credit to the whole undertaking. It may be said that it is a matter for skilful legal and financial counsel to plan and put through, as both judgment and experience are requisite.

CHAPTER LV

PROTECTION OF MINORITY

§ 420. General

The corporate rights of minority stockholders are at the best much circumscribed and those that do exist are frequently disregarded and are then difficult of enforcement. Not infrequently actions of the directors infringing minority rights are not discovered by the minority until too late for prevention or protective action, and legal redress is, as a rule, slow, costly, and inadequate. Such protection as may be secured to the minority in the organization of the corporation is therefore a matter of importance.

When the parties in control of an incorporation are willing to recognize the rights of the minority stockholders, or are compelled thereto by the conditions, it is quite possible for the minority to secure efficient protection for such rights as are properly theirs. Unfortunately the interests which control at the time a corporation is organized are too often indifferent or actually inimical to the rights of the minority stockholders, and these then receive no consideration, save such as is compelled by statute law or by respect for the sensibilities of the investing public.

§ 421. Rights of Minority at Common Law

Under the common law—which still prevails save where and as superseded or modified by statute law—the rights of minority stockholders were not extensive. They were entitled to be present and participate at stockholders' meetings. They were entitled to inspect the corporate stock books dur-

ing the usual hours of business and copy the names therein if they so desired. They also had the right under reasonable conditions to inspect the books of account. Also under the common law a few important matters such as amendment of the charter and the sale of the entire corporate assets required authorization by unanimous vote of the stockholders, and this requirement gave the minority a certain veto power in such matters. At stockholders' meetings the minority might assist in the deliberations, but the majority had absolute power to adopt by-laws and to elect the entire board of directors. The minority might not even have a representative present at board meetings save by grace of the majority.

§ 422. Encroachment on Minority Rights

As already intimated, minority rights under the common law were, at the best, somewhat slender. There is, however, in some states a certain present trend toward the limitation and curtailment of even these rights.

At common law the minority had the right at reasonable times to inspect the books and accounts of the corporation. This right has been so narrowed down by latter-day statutes and decisions that it is, in many states, negligible. In New Jersey it is customary to limit this privilege still further to such inspection as the directors may prescribe. Even the stock and transfer books may be seen only under restrictions.

As to books of account, this change of custom is probably necessary. If it were otherwise, business competitors might avail themselves of the formerly easily acquired right of inspection of the books to obtain information and trade secrets to the injury of the corporation.[1] Also, with the many stockholders and the complex accounts of modern corporations, the right, if freely exercised, would interfere with the regular transaction of business.

[1] *In re* De Vengoechea, 86 N. J. L. 35 (1914).

While this is true, some substitute for the stockholders' inspection of the books of account should be provided that, without injury to the corporation, would give to the stockholders proper information as to the status of the corporate business. To deny it entirely is a flagrant and unjustifiable disregard of the rights of those whose property is at stake.

The abridgment of the stockholders' right to inspect the stock and transfer books is to be viewed with distrust. There would seem to be no proper reason for concealing from a stockholder the identity of his fellow stockholders. The right to make a list of these stockholders is properly denied him if such list is for stock-selling purposes, for sale to other parties, for general circularization, or for similar purposes, but should not be refused him if the list is desired for purposes connected with the corporation.

Again, the right to make by-laws was formerly a prerogative of the stockholders alone, and these by-laws usually imposed certain proper restraints and limitations upon the directors. Now, in New Jersey and a few other states, by charter provision it is possible and not uncommon to give the directors absolute power to repeal by-laws passed by the stockholders, and to substitute, if they so desire, by-laws of their own of exactly opposite effect. This was a concession to the needs of the "trusts" with their centralization of power and their entire subordination of the individual stockholder, and is perhaps the most dangerous of all the innovations upon the old rules, as it virtually releases the directors from all necessity for compliance with the wishes of the stockholders, and leaves in their hands the unrestrained management of the corporate affairs.

It will be understood without discussion that any change in the law acting to increase the powers of the directors, or to remove or prevent limitations thereon, distinctly augments the power of the majority. The board is elected by the

majority and any restraining influences that exist upon the power of this board which represents the majority must be found in the charter, by-laws, and statutes. If, then, the statutes are relaxed, charter limitations omitted, and the board itself given the power to make and amend by-laws, the power of the board as the representative of the majority is greatly increased, and the minority interests become in effect a negligible quantity.

Also the charter may be more easily amended than formerly. In New Jersey such amendment may be accomplished by a two-third vote of the stockholders, in New York by a three-fifth vote, and in Delaware by a bare majority in interest. This latter is a somewhat remarkable relaxation of the former rule, and apparently permits a mere majority to change the entire nature of the corporate business, as for example, to divert capital invested for the purpose of developing a publishing business into the exploitation of a mining claim. It is doubtful whether material change in the charter should be allowed under any circumstances, unless by the practically unanimous vote of all concerned.

In consequence of these tendencies the present condition of the minority stockholder, unless special provision is made for his protection, is even less satisfactory than it formerly was under the common law.

§ 423. Protective Measures

The legitimate ends sought by the minority are honesty, efficiency, and reasonable publicity of management—a management for the good of all and not one primarily in the interests of the majority.

The means that may be employed to secure these ends are of two general classes, the one consisting of such arrangements, modifications, or restrictions of the voting power as to secure to the minority at least a reasonable representation

on the board of directors; the other consisting of provisions in charter or by-laws restraining and regulating the powers of the board and prescribing safe rules for the conduct of the business.

The first-mentioned method is the most effectual for the protection of the minority interests. The usual cases of oppression or fraud on the part of the majority occur in the absence of minority representation on the board. If the minority have one or more directors on the board, the majority will still, as a matter of course, control, but it is in the highest degree improbable that this control will be exercised to the injury of minority interests. If any such attempts are made, the minority stockholders through their representatives on the board will be fully cognizant of the proposed action, may enter such immediate protests and make such representations as they see fit, and, if such prejudicial action is persisted in, may take prompt legal action to protect their interests.

Without this board representation, charter and by-law provisions for the protection of the minority are apt to be of but little effect. With board action free from supervision, and with the assistance of counsel skilled in evasion of the law, such unsupported provisions may be easily overcome or avoided. With an intelligent minority representation on the board, such infringements of minority rights would not usually even be contemplated.

The usual measures for the protection of minority interests are considered in the following sections of the present chapter.

§ 424. Cumulative Voting

Cumulative voting is one of the most effectual means of securing minority representation on the board of directors. So highly are the results of this system esteemed that its use

in corporate elections is prescribed by constitutional provisions in Pennsylvania, Illinois, California, and a number of other states. In New York, New Jersey, and some other states it may be used if so provided in the corporate charter. The Constitution of the State of Pennsylvania outlines the system with much conciseness, as follows:

"In all elections for directors or managers of a corporation, each member or shareholder may cast the whole number of his votes for one candidate or distribute them upon two or more candidates as he may prefer."

The New York statutes go into the matter more fully:

"The certificate of incorporation of any stock corporation may provide that at all elections of directors of such corporation, each stockholder shall be entitled to as many votes as shall equal the number of his shares of stock multiplied by the number of directors to be elected, and that he may cast all of such votes for a single director or may distribute them among the number to be voted for, or any two or more of them as he may see fit, which right, when exercised, shall be termed cumulative voting."[2]

Under this system the majority control and manage the corporation absolutely, but the minority stockholders, if their holdings are at all material, can always elect one or more directors to represent them. If they elect capable men, there is but little danger that the minority interests will suffer.

To obtain the best results from cumulative voting, the minority must be organized to some extent at the time of the annual election, and should delegate by proxy to some few trusted representatives the casting of their ballots.

To cast these aggregated votes to the best advantage sometimes requires nice calculation. For instance, in a corporation with a board of five directors and 100 shares of voting stock, each share will have the right to cast 5 votes, or

[2] G. C. Law, N. Y., § 24.

a total for all the voting stock of 500 votes. In such case any person or persons controlling 17 shares can cast 85 votes, and if this total vote is cast for a single candidate this candidate would infallibly be elected. The aggregate of the other votes cast would be 415, but no matter how they were divided among the other candidates, the candidate with 85 votes could not be defeated. If evenly divided among the five aspirants for board membership, each would receive 83 votes, but the minority candidate with 85 votes would have a plurality of the votes cast, and would under any circumstances have enough votes to insure his election. Some preliminary calculation is always advisable.

There are no material objections to the system of cumulative voting, and it should be adopted wherever possible. Its increasing use is a practical testimonial to its value. It must, however, be used with intelligence, or the results are sometimes surprising. On occasion an unsuspecting majority have so scattered their votes that a compact, well-handled minority have actually gained control of the board. In other words, the majority threw themselves into a minority by scattering. For instance, in the example given above, if the minority, instead of controlling but 17 shares, controlled 45 shares of stock, they would be able to cast 225 votes as against 275 votes cast by the majority. The minority might then very safely divide their votes among three candidates, with the assurance that they would elect at least two directors and might elect the third. The majority would have votes enough to elect three directors, but, if they thoughtlessly scattered those votes among four or five candidates, the three minority candidates, with over 70 votes each, would be elected and would control the board. Such an election, though somewhat unexpected in its results, is legal and would be upheld wherever cumulative voting is properly employed. (See § 155.)

§ 425. Classification of Stock

Where definite divisions of interest exist among the stockholders, or intending stockholders, at the beginning of the corporate organization, classification of stock, where allowable, may be employed with entire confidence that each class will receive due representation on the board. Such classification is permitted in most states, and should be secured by charter provision where possible, elsewhere by by-laws adopted before stock is issued. By-laws of this nature, so adopted, become in effect a contract with those purchasing stock and hence are not susceptible of repeal save by consent of all interests.[3]

Under such an arrangement stock may be divided into any classes desired, equal or unequal in amount. To each of these classes may be assigned one or more directors, and, so long as the corporate organization exists unchanged, each of these classes will elect its own directors to the board. This arrangement is very effective. (See §§ 140, 437, for specific example.)

§ 426. Voting Trusts

The general subject of voting trusts is considered elsewhere. (See Chapter LII, "Voting Trusts.") It is referred to here only as a method of protecting minority rights where these interests are in a position to demand such protection before entering the corporation. This may occur where stock in a corporation is offered for property, or where a partnership is to be incorporated with some of the partners holding comparatively small interests.

In such event the proposed investment or arrangement may be acceptable to the parties concerned, even though it places them in a hopeless minority, if they can be assured of

[3] Kent v. Quicksilver Mining Co., 78 N. Y. 159, 178 (1879); Loewenthal v. Rubber Rec. Co., 52 N. J. Eq. 440 (1894).

representation on the board, or that an acceptable management will be elected and retained for at least a reasonable length of time. In any such case the desired end may be effectually secured by means of the voting trust.

In this connection it may be noted that a mere agreement between parties holding stock that such stock shall be voted for certain persons or in a prescribed manner will not be enforced by the courts even though this agreement be embodied in a formal contract. Under some circumstances damages might be obtained for breach of such a contract, but the contract itself could not be enforced and damages would usually be very difficult to prove.[4]

§ 427. Special Arrangements

Many other arrangements for the protection of the minority or of particular interests are possible, depending upon the circumstances, the statutory provisions of the state of incorporation, and the decisions of its courts.

In those states where special provisions may be inserted in the charter, it is entirely possible, in the absence of express constitutional and statutory prohibitions, to decrease the proportionate vote of the stockholder as his holding increases, or to deny the voting right absolutely after a certain maximum vote has been reached. For instance, it may be provided that each stockholder shall cast one vote for each share of stock held by him up to a total of 10 shares; that on stock in excess of this amount up to 100 shares, he shall have one vote for each 5 shares; that on all stock in excess of 100 shares he shall have one vote for each 10 shares. This is the voting provision of the English Companies Act which has some merits. Any other apportionment of the voting power may be made, or it may be provided that after some maximum vote has been reached, as for instance 10 votes for 10 shares held,

[4] Gage v. Fisher, 5 N. D. 297 (1895).

no further vote shall be cast by such stockholder no matter what his holding.

It is also possible to place the number of votes necessary to elect a director so high that under any ordinary circumstances directors cannot be elected save by agreement. For instance if a three-fourths vote of the outstanding voting stock were necessary to elect, it would be but seldom that the majority could elect without minority assistance. Then they must either allow the management to remain without change, as will be the case if there is no election, or unite with the minority to elect. If this were necessary they would hardly propose anyone objectionable to the minority element. This plan presupposes an existing management acceptable to all the stockholders. (See § 429.)

§ 428. Annual Audits

In the larger corporations the auditing of the books of account is a very important feature of the corporate operations, and, if properly conducted, may be made to eliminate any necessity for the inspection of such books by the rank and file of the stockholders. Such auditing may be annual, quarterly, or held at irregular intervals, and, if made by proper parties, serves both as a check on the management and a verification of their accounts. The results of these audits give the stockholders the general information in regard to the business that they have a right to demand, and, as intimated, thereby remove the necessity for examination of the accounts by these latter. It is, of course, imperative that the professional accountants employed as auditors be absolutely reliable and thoroughly qualified for their work.

§ 429. Charter Limitations

In New York, New Jersey, and some other states, limitations on the power of the majority may be inserted in the

charter. At the inception of the enterprise, the minority are not infrequently in a position to demand the inclusion of such limitations as a condition precedent to their participation in the incorporation. Even if otherwise, an era of good feeling generally exists at this stage of the enterprise, and reasonable concessions may then be obtained which later would not be possible. The minority have a right to ask safeguards as a condition of their investing.

An instance is afforded by the charter of one of the prominent industrial trusts in which the following provision is found:

"It is hereby provided that it shall require a majority of seventy-five per cent of the outstanding voting stock to amend the charter, to amend the by-laws, or to elect directors in this company."

Such a provision is directly in the interests of the minority. In this case it may have been conceded voluntarily, but probably its adoption was demanded by some of the smaller but necessary component corporations as one of the conditions of their entrance into the combination. Under such a provision no changes could be made in charter, by-laws, or the board of directors against the wishes of a minority controlling 26 per cent of the voting stock. Under such circumstances a minority judiciously handled could always protect its interests. This arrangement cannot be had in New York as the statute specifies that directors shall be elected "by a plurality of the votes at such election."

As damage to minority interests or the wrecking of corporations is almost invariably caused by improvident contracts, unwarrantable salaries, or excessive indebtedness, charter limitations upon the power of the board in these directions are of frequent occurrence. Some flexibility is usually given to these restrictions by provision that their limits may be exceeded by a unanimous vote of the board, or by a two-

thirds or three-fourths vote of the outstanding voting stock, or by some similar provision.

Where these limitations exist, it is important that some such flexibility be provided, as otherwise the interests of the corporation might on occasion suffer severely. The limits of charter provisions cannot be legally exceeded by the corporation, either by action of the directors or stockholders, except as specifically allowed by the charter itself, and business opportunities of obvious advantage to the corporation might be lost for lack of the power to meet their terms or conditions.

It is also possible to provide in the charter that the minority may have reasonable access to the books and records of the corporation, and any other desired privileges not in conflict with the statutes may be so secured. (See §§ 149, 158, 225.)

§ 430. Legal Remedies

Prevention of wrong is better than any remedy, but a knowledge of their rights and the remedies that the law gives for infringement of their rights is sometimes of much advantage to minority stockholders. The usual methods of wronging minority stockholders, such as paying inordinate salaries, withholding dividends, selling or leasing corporate property below its worth, running the corporation into debts which it cannot meet, and similar fraudulent and oppressive transactions, are all illegal and tortuous. For all of these wrongs the law will give redress if those who suffer will seek it.

When salaries are wrongfully increased the courts will compel restitution, and in such case the whole of the inordinate salary must be returned, not merely the excess. Directors are trustees and cannot use their power as such to enrich themselves. Neither can this just rule be evaded by each

director's not voting on his own salary but letting it be fixed by his brother directors.[5] Directors, like promoters, will be compelled to account for any secret profit which they may make in any transaction in which the corporation is interested.[6]

The directors control the declaration of dividends. "When a corporation has a surplus, whether a dividend shall be made, and if made, how much it shall be, and when and where it shall be payable, rest in the fair and honest discretion of the directors uncontrollable by the courts."[7] But if this discretion is not honest and fair, but dividends are withheld to discourage minority stockholders and induce them to sell their stock at low prices, the courts will interfere on behalf of the minority.[8]

In Fitchett v. Murphy, 46 A. D. 181, 184, 185 (1899), the court said:

"This is one of those cases where a majority of stockholders have entered into a combination to control the affairs of the corporation for their own benefit and in fraud of the rights of the minority. Such a combination will always be rebuked by a court of equity. . . .

"Directors of a corporation have no right to vote salaries to one another as mere incidents of their office, as was done here."[9]

Another device for robbing minority stockholders is to make improvident contracts, usually with some other organization with which the offending directors are connected. Many such cases have come under the condemnation of the

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[5] Davids v. Davids, 135 A. D. 206 (1909); Miner v. Ice Co., 93 Mich. 97 (1892); Butts v. Wood, 37 N. Y. 317 (1867); Jacobson v. Brooklyn Lumber Co., 184 N. Y. 152 (1906); Davis v. Thomas & Davis Co., 63 N. J. Eq. 572 (1902); Luthy v. Ream, 270 Ill. 170 (1915).

[6] Billings v. Shaw, 209 N. Y. 265 (1913).

[7] Williams v. W. U. Telegraph Co., 93 N. Y. 162, 191 (1883); Equitable Life Assur. Soc. v. U. P. Railroad Co., 212 N. Y. 360, 373 (1914); Hyams v. Old Dom. Copper Mining, etc., Co., 82 N. J. Eq. 507 (1913).

[8] Hiscock v. Lacey, 9 Misc. Rep. (N. Y.) 578 (1894); Belfast, etc., Co., v. R. R. Co., 77 Me. 445 (1885).

[9] Bixler v. Summerfield, 195 Ill. 147 (1902).

courts.[10] In such a case, the Supreme Court of the United States said:

"All arrangements by directors of a railroad company, to secure an undue advantage to themselves at its expense, by the formation of a new company as an auxiliary to the original one, with an understanding that they, or some of them, shall take stock in it, and, that valuable contracts shall be given to it, in the profits of which, they, as stockholders in the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the courts for consideration.[11] Such transactions being fraudulent cannot be authorized or ratified by a majority of the stockholders.[12]

When the corporation is wrecked by purposely running it into debt, necessitating a receivership and subsequent reorganization, out of which the wreckers in some form profit, it is usually difficult to prove the wrongdoing. Bad management in good faith is so common that it is not easy to draw the line and show in any particular case that the mismanagement was intentional.

Where the directors do not use ordinary care and diligence in the discharge of their duties, they are liable for the damage caused by their negligence.[13] In practice, however, it may be very difficult to prove such negligence as will entitle the complaining stockholders to damages. In one notable case, the United States Supreme Court evidently allowed its sympathies to warp its judgment.[14]

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[10] Sage v. Culver, 147 N. Y. 241 (1895); Flynn v. Brooklyn City R. R. Co., 158 N. Y. 493 (1899); Jacobus v. Diamond Soda Water Co., 94 A. D. (N. Y.) 366 (1904); Schwab v. Potter Co., 194 N. Y. 409 (1909).

[11] Wardell v. The Railroad Co., 103 U. S. 651 (1880).

[12] Dana v. Morgan, 219 Fed. 313 (1914); Pollitz v. Wabash R. R. Co., 207 N. Y. 113, 127 (1912).

[13] 3 Cook on Corp., § 702 and cases cited; Chick v. Fuller, 114 Fed. 22 (1902); Doe v. N. W., etc., Co., 78 Fed. 62 (1896); Com. Bank v. Chatfield, 127 Mich. 407 (1901); Bloom v. Savings, etc., Co., 152 N. Y. 114 (1897); Sage v. Culver, 147 N. Y. 241 (1895).

[14] Briggs v. Spaulding, 141 U. S. 132 (1891).

The minority stockholders may also, under certain conditions, obtain redress against the majority stockholders. As the directors are the managers of the corporate business, they are usually the persons responsible for the infringement of the minority stockholders' rights. However, it is not infrequently the case that another corporation or group of men obtain control of the corporation and proceed to employ it to further their own interests. In such cases it has been held that those who control the majority of the stock occupy a fiduciary relation towards the minority, and that acts in their own interest to the detriment of the minority stockholders are wrongs for which the court will give relief.[15]

The practical difficulty is that the archaic and clumsy procedure of our courts makes litigation so slow and so expensive that the ordinary citizen cannot afford, in most cases, to seek the redress to which he is entitled. By the theory of the law he may right his wrong, but in practice the cost and delay of litigation make it impossible.

[15] Boyd v. N. Y. & H. R. Co., 220 Fed. 174 (1915); Hyams v. Calumet & Hecla Mining Co., 221 Fed. 529 (1915); Union Pac. R. Co. v. Frank, 226 Fed. 906 (1915); McManus v. Durant, 168 App. Div. (N. Y.) 643 (1915).

CHAPTER LVI

INCORPORATING A PARTNERSHIP

§ 431. General

The incorporation of a partnership involves problems differing from those of the incorporation of a new enterprise. These problems vary with the conditions and requirements of the particular partnership.

If the partners are willing to adopt the simplest and most obvious corporate arrangements; if they will capitalize at the actual values; issue all the capital stock in payment for the values transferred to the corporation; allot this full-paid stock to the various partners in the proportion of their partnership interests, and thereafter let matters take their natural corporate course, the duties of the incorporating counsel are not onerous. Usually, however, the parties to such an incorporation are not willing to commit themselves so irrevocably to the operations of the unmodified corporate system. They are accustomed to the conditions of the partnership, and they wish these approximated as nearly as may be under the new regime.

Possibly all the partners, without regard to investment, may be participating equally in the management; or one partner, with a relatively small investment, may be the leading spirit and practically in control; or a silent partner, taking no active part in the management, may have a preponderant investment. In any of these cases, the ordinary operations of the corporate system would work a radical change, and it is not to be supposed that the partners would agree to the entire abolition of the conditions under which perhaps they

have achieved success. On the contrary, they usually desire to continue the existing conditions. This may be done with much precision, for nowhere does the flexibility of the corporate system appear to better advantage than in its ready adjustment to the varying needs of partnership incorporations.

§ 432. Name

The partnership name should in itself represent a considerable trade value that would be lost if it were dropped on incorporation. To avoid this, the name of the partnership is usually adopted, as nearly as may be, as the name of the new corporation. In those states where it is permissible, the partnership name is not infrequently taken without modification as the corporate designation. This practice is, however, open to objection, as there is then nothing in the corporate name to indicate that the concern is a corporation, and parties doing business with it might, unless informed of its corporate nature, be able to hold the stockholders as partners.

Such a possibility largely eliminates the most advantageous single feature of incorporation—its limited liability—and to retain this feature, while still preserving the actual form of the partnership name, the word "Incorporated" is frequently added. This usually appears in small letters below or after the name, sometimes in parentheses, and effectually prevents any danger of partnership liability.

In some states the word "Company" must form part of every corporate name, and in these states the usual practice when a partnership is incorporated is to adopt the partnership name with the prescribed word following—"Smith & Jones" becoming on incorporation "Smith & Jones Company." This practice is very common in all the states, whether required by law or otherwise, and is generally preferable to the use of the unmodified firm name, or its use in connection with the word "Incorporated." In New York and a few

other states, the word "Incorporated," its abbreviation "Inc.", or other words indicating incorporation must be used in the name to distinguish clearly the corporation from an individual or partnership business.

Another common modification of the firm name is to substitute a hyphen for the connecting word and add "Company," "Smith & Jones" then becoming the "Smith-Jones Company." In most of the states the prefix "The" either may or may not be made part of the corporate name, though in a few states its use is obligatory. Owing to the additional length given the corporate name by its use, and its exceeding awkwardness in certain legal constructions, the word "The" is better omitted unless there are special reasons for its retention. (See Chapter XVII, "The Corporate Name.")

§ 433. Capitalization

If after incorporation the partnership business is to go on under the corporate form with only the former partners interested, no stock being sold to outsiders, the simplest and possibly most satisfactory basis of capitalization is the actual value of the assets turned into the new corporation, without allowance for good will, trade-name, or any other intangible assets. Then, on incorporation each partner will participate in the stock by which this capitalization is represented, dollar for dollar, to the amount of his existing partnership investment.

Under this plan the capital stock of the new company is kept at a comparatively low figure, taxation is to some extent avoided, while the respective proportionate interests of the different partners are accurately preserved. As will be readily seen, no very exact estimate of the value of the business is necessary under this arrangement. The capital stock merely serves as a convenient method of adjusting the proportionate interests of the partners, and, no matter what its

amount, these interests are still represented in proper proportion.

If, however, new members are to be taken into the incorporated business, or any of the partners expect to sell stock, or it is anticipated that at any time in the near future stock will change hands, the proper valuation and capitalization of the business become matters of great importance. Then the value of the good-will should be added to the property values; also any other intangible assets, such as trade-names, trade-marks and copyrights, should be included at a fair figure. All of these are valuable assets and are legitimately represented in the capitalization of the business. Contemplated profits are not a proper basis for capitalization,[1] but a valuation of a plant based upon the earnings for the previous year, capitalized at 6 per cent interest, has been held proper.[2]

Any desired property may, of course, be reserved to the partnership. If the partners wish to retain a portion of the cash on hand, or certain portions of the firm realty or other property, or think certain accounts better in their own hands, the whole matter is in their discretion. They may retain what they will and transfer what they will.

The form of capitalization is also a matter of conditions and discretion. It may be all common stock, or preferred stock and bonds may be added. The matter rests entirely with the partners. If it is decided to issue bonds, the stock capitalization will naturally be reduced by just that amount. If preferred stock is issued, the common stock will be reduced by that amount, but the total capitalization will remain the same.

If additional capital is needed for the business of the new corporation and stock must be sold to secure it, the

[1] See v. Heppenheimer, 69 N. J. Eq. 36 (1905).
[2] Railway Review v. G. D. & M. Tool Co., 84 N. J. Eq. 321 (1914).

amount of capitalization determined by the total value of the partnership assets—including good-will—would naturally be increased by the amount of stock to be sold.

§ 434. Exchange of Property for Stock

The value of the partnership business and property having been determined, and the capitalization of the corporation fixed at this total value, the business as a going concern will be offered to the new corporation in exchange and full payment for all its capital stock. This offer should be by formal written proposition, usually signed by one of the partners with the firm name, but sometimes signed by all the partners.

This proposition is usually accepted without demur, the new corporation authorizing the issue of its capital stock in payment for the property. The capital stock will then be issued in accordance with the terms of the proposition, and the partnership business and property as tendered will be transferred to the corporation, usually by formal bill of sale, though sometimes by mere delivery of possession. The partnership books of account will be closed by proper entries showing the transfer to the corporation, and proper corporate books will be opened. This completes the transaction as between the partnership and the corporation.

The corporation then owns the business as transferred to it, but the partnership still exists with the stock as its sole asset, unless some of the partnership property has been reserved from the sale to the corporation. The distribution of this stock among the partners in accordance with previous agreements, or usually in proportion to their respective firm interests, completes the usefulness of the partnership. It may then be continued in a quiescent condition, be dissolved by formal agreement, or merely be allowed to lapse. If no partnership property was reserved and the stock received by

the firm is distributed, and there are no special reasons for its continuation, dissolution by formal agreement is the better practice, avoiding any possibility of subsequent entanglements or liabilities. If it is desired to avoid any possibility of future liability under the old firm, formal notice should be given, by mail or publication, of the incorporation of the business and the dissolution of the partnership.

§ 435. Stock Adjustments

In an ordinary partnership, when the investments are equal or nearly so, the stock received in exchange for the partnership property is usually all common stock and is distributed among the partners in proportion to their respective investments in the old partnership. If, however, special conditions are to be met, this arrangement may be varied almost indefinitely.

At times preferred stock is desired by the partners to represent a portion, at least, of the property transferred by them to the corporation. Such stock has the advantage of its fixed preferential dividend that must be paid if any profits are made, and, as far as permitted by the state laws, it may be given any other powers or privileges deemed necessary.

At other times the partners will perhaps prefer to have a portion of the payment for property transferred to the corporation in the form of bonds. Corporate taxation is usually thereby avoided, though personal taxation may be proportionately increased. Beyond this, bonds are a safe and very convenient form of corporate security to hold if the incorporated business is, in whole or in part, going into new hands.

By the use of common stock, preferred stock of varying powers and privileges, and bonds, almost any requirements of a partnership to be incorporated may be satisfactorily met. For instance, a silent partner's interest might be properly provided for by a preferred stock, drawing a preferential divi-

dend equal to the rate of interest theretofore paid upon this partner's investment, or participating otherwise in profits to the same extent as the investment did before. This preferred stock might be allowed to vote, or if it were not desirable that the silent partner should participate in the management, the voting right might be denied, or his entire interest might be provided for by an issue of bonds which would draw a fixed interest without regard to profits, but could not vote.

Or if one partner's investment were much larger than that of other partners', but equality in management were desired in the new corporation, the excess interest of the one partner might be provided for by non-voting preferred stock, by a bond issue, or perhaps by an issue of common stock without the voting right. In the latter case such partner would participate in all profits on the basis of the full amount of stock held by him but would not vote on the excess portion. If his excess investment were in bonds, he would vote and participate in dividends on the basis of the amount of stock actually received by him, but would receive in addition the fixed amount of interest called for by his bonds. Also, at some specified date he would receive payment of the face of his bonds, his excess investment under these conditions constituting a preferred claim against the corporate property. Under the preferred stock plan, he would participate in profits to the full on his quota of common stock, but on this preferred stock would, as usually arranged, participate in profits only to the extent of his preferred dividend. The final redemption of such preferred stock might or might not, according to the arrangement, take precedence over any liquidation of the common stock. (See Chapter IX, "Preferred Stock.")

§ 436. Board of Directors

If the partners take the amount of stock in the new corporation to which their respective partnership interests entitle

them, and let the selection of the board take its natural course thereafter, the matter is simple. Usually, however, the partners wish an equality of power in the board, or a specified representation, or a classification, or some other special arrangement, and the composition and method of electing the board of directors frequently becomes the most difficult question arising in the incorporation of a partnership.

Where equality of power is desired, each partner will usually designate one or more directors so that the completed board will contain an equal number of representatives for each partner. Where the partnership consists of three or more, the usual practice is to make the number of directors equal to the number of partners, elect all the partners, or the chosen representatives of any partners not wishing to appear on the board, and then make provision for the maintenance of the board so constituted. (See § 437.)

Where there are two partners the matter is less easily arranged. Three is the minimum number of directors usually allowed, and the necessity of having a third director who really has the deciding vote in any point of difference makes the situation difficult. Sometimes a confidential clerk, or a mutual friend, or the wife of one of the partners is chosen, but in event of any difference, the result is apt to be very unsatisfactory. If possible, a mutual friend of character and standing may be elected with the understanding that he is not to be involved or troubled in any way unless serious differences arise, when he will virtually act as an arbitrator. Another plan is to have some indifferent person accept the office and immediately resign, leaving the third position vacant with the two partners in control to fight out any differences, just as they would have done in the days of the partnership. If this plan were objectionable on account of the incomplete condition of the board, the membership of the directorate might be fixed at four, each partner being elected to the board

and designating an additional member. In such case it may be wise to provide for arbitration in case of a deadlock.

§ 437. Maintenance of Agreed Management

When the composition and manner of election of the board of directors has once been decided, some means of securing the permanency of the agreed arrangement is usually desirable. If mere representation of the minority interest on the board is desired, this may usually be secured by the adoption of cumulative voting. In some states, however, cumulative voting is not permissible, and in many cases more than minority representation is desired. Other means must then be adopted. Some of these are as follows:

1. *By Voting Trust.* The voting trust is often the most satisfactory means of preserving the agreed status of corporate management, the members of the old partnership usually constituting the membership of the trust.

The objections to the voting trust for such a purpose are its limited duration, and the fact that the stock owned by the partners is itself locked up in the trust, and, for purposes of sale or other use, must be represented by trustees' certificates.

In New York and Maryland the life of a voting trust is by statute expressly limited to five years, and it is doubtful whether the arrangement could be enforced or continued, save by mutual consent, for a longer period. In states where there is no legislative provision in regard to the voting trust, it is probable that a trust for the purpose of maintaining an agreed management would be sustained for any reasonable period, as ten or even more years.

In case of the formation of a voting trust, the actual assignment of the stock to the trustees cannot be avoided, as irrevocable proxies would be practically impossible under the usual conditions. The owners of the stock must therefore content themselves with trustees' certificates. For holding

and for some other purposes these certificates would not be objectionable. For selling or for use as collateral they would not be so available as the stock itself. (See Chapter LII, "Voting Trusts.")

2. *By Voting Requirements.* In most states where special charter provisions are allowed, it may be provided that any desired majority shall be necessary for the election of directors, and this majority may be made so large—even up to the unanimous vote of all the outstanding voting stock—that the agreed status of the board can be disturbed only by the active consent of all interested parties. Deadlocks may occur at times under such a provision, but their only effect would be to leave the board *in statu quo,* thus maintaining the agreed arrangement but dispensing with the election.

It would be but rarely advisable or wise to require unanimous consent to the election of directors. The same ends may be practically secured by a two-thirds or three-fourths majority, and the danger of factious opposition by holders of a small number of shares is thereby avoided.

It is to be noted that under this arrangement, in event of the death or resignation of a director, the interests for which such director stood would not be represented on the board and could regain such representation only by consent of sufficient stock to make up an electing majority. This objection to the plan is under some conditions fatal.

3. *By Classification of Stock.* The classification of stock offers a very permanent method of maintaining a representative directorate. Each partner's stock may be constituted a class with some convenient arbitrary designation, as "Class A," "Class B," or "Class 1," "Class 2," etc., and each one of these classes be endowed with the right to elect one or more directors. If desired, one class may be allotted a greater number of directors than others, though usually each class is allowed equal power as to the election of directors.

For instance, in the incorporation of a partnership with property and other assets of the estimated value of $100,000, of which $50,000 belongs to one partner, $30,000 to a second, and $20,000 to a third, it might be desired that the same equal participation in the management that characterized the partnership should be continued in the corporation. This might be effected with absolute certainty by capitalizing at the estimated value and dividing this stock into three classes, $50,000 in the first, $30,000 in the second, and $20,000 in the third; giving to each class the right to elect one-third of the membership of the board, and issuing to each partner the class of stock which represents his partnership interests. Then, notwithstanding their very unequal interests in the business, each would elect one-third the total number of directors. If it were not desired to secure this absolute equality in the management of the business but merely to insure representation to the two minority partners, this stock might be classified as before on any apportionment deemed expedient, the first class being given, say, three directors of a board of five, and the second and third classes, one each.

Under this system the interests holding any one class are absolutely sure that, so long as they hold their stock intact, or *hold a clear majority of it,* they can elect their allotted membership of the board, and that in no other way than by the purchase of at least a majority of their stock can this representation be wrested from them. It is obvious that the plan is capable of considerable variation to fit special cases.

A modification of this plan where equal representation is desired is to divide the voting stock of the corporation equally among the partners, and then issue preferred stock without the voting power to cover the excess investment of any particular partner. Also, where more capital is desired, such non-voting preferred stock may be sold without interfering with the original division of power. (See § 140.)

§ 438. Officers

In the conversion of a partnership into a corporation, little difficulty is experienced in the selection of officers, as the partners usually take these positions; their previous habits, duties, and positions in the firm designating with more or less precision the official position for which each is best fitted.

It may be noted, however, if there is difficulty in the assignment of the official positions, that outside of a few matters specified or implied by the statutes of some states, the powers and duties of officers may be fixed absolutely by charter or by-laws. The power of the president may be restricted in any way the conditions seem to demand, any desired limitations may be placed upon the power of the treasurer, the secretary may be assigned any powers or duties within or without the usual range, and any or all of these officers may be made as dependent upon, or as independent of, the board and of their fellow officers as may be deemed expedient.

Usually it is not the part of wisdom to vary the customary powers and relations of the corporate officers, but occasionally in the adjustment of partnership relations under the corporate form such changes may be made to advantage.

§ 439. Close Corporations and Their Conduct

As a rule, when partnerships are incorporated all the stock is issued to, and held by, the former partners, who are also officers and directors of the new corporation. The corporation is then owned by, and in fact composed of, these few persons. Such a corporation in which all the stock is held by a few persons who are also officers and directors of the corporation, is a typical "close" corporation.

The conduct of a close corporation can be, and usually is, more informal than that of the ordinary corporation with a number of stockholders. Especially is this the case with

incorporated partnerships where the members of the new corporation are friends and associates of long standing and are accustomed to working together.

The business of a close corporation of this nature is conducted with the same informality as that of an ordinary partnership. The directors and officers are chosen at the time of organization, and it is usually understood that this organization is to be permanent. If owing to death or withdrawal a vacancy occurs, a special meeting of the board is very easily called to elect a successor. The various duties are assigned to the different officers on the basis of their duties under the partnership. About some matters all will confer; other matters will be decided by special officers who have them particularly in hand. Frequently some one man dominates everything and directs the business just as he did before in the partnership.

The profits of a close corporation may be apportioned in the same irregular manner. Usually by agreement certain salaries are attached to the various official positions, and most of the profits are taken out in this manner. As the amount paid in salaries diminishes by that much the income of the corporation and thus avoids the payment of state and federal income taxes, there is in every close corporation a strong temptation to raise the salaries of the principal officers to the maximum figure. As the profits of a close corporation are usually largely the returns for personal ability and business skill, there is often good ground for the payment of liberal salaries. The tax officials will, however, properly interfere if the salaries exceed fair payment for the services rendered and are obviously being used to evade the payment of taxes. At some future time it is likely that there may be more definite rules on this subject than exist at present. Now it is hard to decide in each case what is legally and ethically justifiable.

From the practical standpoint, the free and easy conduct

of the ordinary close corporation is not open to serious criticism. Nor, so long as all goes well and no stockholder objects, and no creditors remain unpaid, is there any legal objection.

How far the courts sustain this informal conduct of close corporations is shown by the following cases:

In Hall v. Herter Bros., 83 Hun (N. Y.) 19, 22 (1894), a partnership had incorporated with five incorporators, consisting of the two partners, the father of one partner, the brother of the other, and a salesman who had been with the partnership for some time—a typical close corporation. Judge Alton B. Parker, in discussing the very informal procedure of the corporation, said: "Now, when there are so few interested in the management of a corporation, ordinary business may be transacted without the formality of resolutions. It may be done by conversation without formal votes."

In the Massachusetts case of Melledge v. Boston Iron Co., 5 Cush. 158, 179 (1849), the court said: "Where a corporation consists of a small number of persons, like a partnership, they may transact all their business by conversasation without formal votes."

In Little v. Garrabrant, 90 Hun (N. Y.) 404; affirmed, 153 N. Y. 661 (1897), a corporation consisted of Richard Worthington holding 10 shares, his wife holding 139 shares, her housekeeper holding 50 shares, and a nephew holding 1 share. "From the beginning to the end all of the family expenses, rent, fire insurance, taxes, together with their contributions to charity and church and missionary societies, were paid out of moneys of the Worthington Company by checks drawn against its account in the bank or from the proceeds of checks thus drawn." Nevertheless the court held that there was no illegality in this exceedingly loose method of doing business, and that creditors who became such after the time of this distribution could not complain. Creditors who were

such at the time might have objected to the very irregular disbursement of the corporate funds, but creditors who became such later could not.

In the case of Groh Sons v. Groh, 80 A. D. (N. Y.) 85 (1903), where a brewery owned by the Groh family had become incorporated, the court said:

"As between the owners and holders of all the stock of a corporation, it must in principle follow that the members of such corporation entitled to receive dividends may agree among themselves, either by conversation or otherwise, to appropriate of the funds of the corporation a specified sum, as agreed upon, and distribute the same, and the stockholders, upon receipt of it, will acquire good title thereto as against the other members of the corporation. It amounts to a mere division of the property by agreement of all the parties in interest, and as between them it is perfectly good and may not be attacked *where the act does not impair the rights of third parties.*"[3]

The decision in this case was afterward reversed; not, however, because of this very informal method of declaring dividends, but on other grounds.

In the consideration of close corporations, the minimum number of stockholders required to form a legal corporation is a matter of importance. The minimum of incorporators in most of the states is three and this fixes the original number of stockholders, but there is usually no statutory requirement that this number of stockholders shall be maintained. It is but seldom that a corporation has less than three stockholders, but there is no legal objection to one person owning all the stock of a corporation, save in those states where directors must be stockholders. There would, however, be practical difficulties in the conduct of a corporation with but one

[3] See also Eureka Iron Works v. Bresnahan, 60 Mich. 332 (1886); Lemars Shoe Store Co. v. Manufacturing Co., 89 Ill. App. 245 (1899); Jordan & Co. v. Collins & Co., 107 Ala. 572 (1894).

stockholder, and in any such case it would be expedient to put at least the nominal ownership of one or more shares of the stock in the names of other parties. This would qualify these others for board positions and would also enable them to assist in holding meetings. In England it has been held that one stockholder cannot conduct a meeting by himself, but in this country the reverse has been held.[4]

In most of the states three directors are prescribed by the statutes, and if the directors must also be stockholders this in itself necessitates at least three stockholders. It is always possible to comply with any legal or practical requirements for additional stockholders by placing the nominal or actual ownership of one or more shares of stock in the names of suitable parties.

§ 440. Restricting the Sale of Stock

The stock of a close corporation is usually not for sale. On the other hand, a stranger would not usually desire to buy stock in a close corporation, as the stockholders in control, if they were disposed to resent the intrusion of the newcomer, could combine in many ways to make his holding unsatisfactory. To make assurance doubly sure, however, special arrangements are often made to prevent the sale of stock in close corporations to strangers. (See § 418.)

The most common method of attempting this is the passage of a by-law prohibiting the sale of stock to anyone not already a stockholder, or prohibiting the sale of stock unless with the consent of the directors, or unless it has first been offered to the directors at a price not greater than that at which it is subsequently offered or sold to outsiders. Such by-law provisions are usually illegal and incapable of enforcement, as the policy of the law is opposed to any restrictions

[4] Sharp v. Dawes, 2 Q. B. Div., 26 (1876); *In re* Sanitary Carbon Co., 12 W. N. 223 (1877); *contra* Morrill v. Little Falls Mfg. Co., 53 Minn. 371 (1893).

upon the free transfer of stock. If a stockholder, in defiance of the terms of such a by-law, should sell his stock, the purchaser could force the corporation to recognize him as a stockholder and to issue him certificates in his own name.

If, however, any such restriction were printed on the stock certificate, it would, regardless of its legal force, make the stock extremely difficult to sell and would thus indirectly accomplish the desired end. Few people care to purchase rights which may require tedious and expensive process of law for their enforcement.

In one case a by-law was framed providing that no transfer would be recognized by the corporation unless the written consent thereto of the three directors of the corporation was indorsed on the certificate. This by-law was embodied in the certificate, and a blank form of directors' consent was printed on the back with places for the signatures of the three directors. In practice this effectually prevented the sale of the stock, but if anyone had in defiance of the provision purchased the stock without the consent of the directors, he could have forced the corporation to recognize his rights as a stockholder.

Stockholders may, however, mutually agree to give each other an option to purchase their stock at a specified price, or at an appraised price, or at a price not greater than that at which it afterwards might be sold. In any such case the contract is legal as between the stockholders; but if in violation of his agreement a stockholder sold his stock, the purchaser would take it unaffected by this fact. The seller might be held liable in damages to the other parties but the sale would stand.

In a New York case four parties, wishing to perpetuate the successful management of a valuable business, agreed that in event of the death of any of the parties, or in event of any party wishing to sell, that the other parties should have a thirty-day option on his stock at $125 per share. When one

of the parties died, his executor refused to carry out the contract. Suit was brought to compel specific performance and the contract was upheld.[5]

There is a line of cases in Massachusetts and New Hampshire in which by-laws restricting the alienation of stock have been sustained as between the parties to the contract—i.e., the stockholders who purchased stock knowing of and agreeing to the by-law restrictions—on the general ground that, while such a by-law might be contrary to public policy as it applied to the rights of outsiders, it was valid as a contract between the stockholders.[6]

[5] Scruggs v. Cotterill, 67 A. D. (N. Y.) 583 (1902); Costello v. Brewing Co., 69 N. H. 405 (1898).

[6] Trust Co. v. Abbott, 162 Mass. 148 (1894). This case is discussed in 27 L. R. A. 271; Blue Mt., etc., Assn. v. Borrowe, 71 N. H. 69 (1901).

CHAPTER LVII

CONSOLIDATION, REORGANIZATION, AND DISSOLUTION

§ 441. Forms of Consolidation

The methods by which corporations may be practically unified are as follows:

1. Consolidation of one or more corporations by statutory procedure.
2. Purchase by a corporation of the entire assets of one or more other corporations.
3. Lease by a corporation of the entire property of one or more other corporations, usually for a specified amount or a guaranteed dividend.
4. Purchase by a corporation of a stock control in one or more other corporations.
5. Combination, usually by means of a holding company.[1]

The terms consolidation, combination, merger, and amalgamation are loosely applied to any of the foregoing plans for joining the interests of two or more corporations. Strictly speaking, a consolidation is the combination or merging, by procedure prescribed by the statutes, of two or more corporations into a single new organization embracing the respective interests and property of the merged corporations.[2] Such consolidation without statutory authority is *ultra vires*, i.e., beyond the corporate powers, and hence void, unless authorized by unanimous vote of all the stockholders.

In any case where it is desired to unify corporate busi-

[1] Noyes' Intercorporate Relations, § 1.
[2] Green's Brice's Ultra Vires (Second Edition), § 631.

nesses, careful study of all the circumstances and local statutes should be made before deciding on the method to be followed, in order on the one hand to avoid violation of corporate law, and on the other hand to secure the most effective possible combination.

§ 442. Statutory Consolidation

In nearly all the states laws are provided for the consolidation of non-competing railroads. Not so many have statutes authorizing consolidation of business corporations. Such statutes, when they exist, are usually made to apply only to corporations engaged in the same or similar business. Under such provisions a gas company and an electric light company have been held competent to consolidate. Ordinary business corporations rarely combine under the statutory provisions, as it is usually simpler to unite by some other method.

Where there are statutes providing for consolidation, it is usually specified that a majority or two-thirds or three-fourths of the stockholders must vote in favor of such action. In many of the states dissenting stockholders may require the corporation to purchase their stock at an appraised valuation. If there is no statutory form for consolidation, it may, unless in some way prohibited, always be authorized by the unanimous vote of all the stockholders.

The usual procedure for statutory consolidation is as follows:

1. Agreement as to terms by directors of the consolidating corporations.
2. Submission of directors' agreement to the stockholders of each company at a duly assembled meeting.
3. Assent of the stockholders to the directors' agreement by a required vote.

4. Filing of certified copies of the agreement and the vote in its favor in the same offices in which the original certificate of incorporation of each of the consolidated corporations was filed.

§ 443. Consolidation by Sale or Lease of Assets

1. *Sale of Assets.* When all the stockholders consent, a business corporation—as distinguished from a public utilities corporation—may sell its entire assets for the stock of another corporation. The first corporation may then dissolve and divide its assets—which consist of the stock of the other corporation—among its stockholders. The purchasing corporation then continues both its own business and the business of the dissolved corporation, the stockholders of the defunct corporation now holding their proportionate interest in the operating corporation.

This is the simplest and best method of effecting a consolidation. The only obstacle to its use is found in the fact that one dissenting stockholder can interpose and prevent the consummation of the plan. In such case it is often possible to buy out the dissenting stockholder or stockholders, and carry out the consolidation as proposed.

A public utilities corporation having a franchise derived from the public is not free to sell it at pleasure. In such cases consolidation must be effected in some other way.

2. *Lease of Property.* A lease of the entire property of a prosperous corporation may be made only by unanimous consent of all its stockholders, and consolidation by means of a lease contract is therefore available only where consolidation could be effected by sale of the corporate assets as already discussed.

A corporation that is in a failing condition may, however, lease its property by action of its directors, or of a majority of its stockholders when such lease is for the best

interests of the creditors and stockholders,[3] and in this case a practical consolidation by means of a lease is possible.

In many cases railroads are empowered to lease their properties, and such action may be authorized by majority vote of the stockholders. A practical consolidation by means of a lease is then possible.[4]

Where a valid lease of a corporation's entire property is made, the lessor corporation's only active business operations are then the reception of its rentals and the apportionment of these among its stockholders as dividends. In some cases property is leased on the basis of a guaranty of a certain dividend on the stock of the lessor corporation.

§ 444. Consolidation by Purchase of Controlling Interest

When it is desired to unify the operations of two or more corporations, it may be done by the common ownership of a controlling interest in each corporation. This controlling interest may be in the hands of an individual, a syndicate, or a holding corporation.

The approved form is by means of a holding corporation, formed under the laws of New Jersey, New York, Maine, Delaware, or some other state where corporations are empowered to hold the stock of other corporations. This "holding company" buys up a majority of the stock of the companies which it is desired to unite. At the next annual elections of these controlled corporations boards of dummy directors are elected, who manage the different combined corporations along common and non-conflicting lines in accordance with the instructions of the holding corporation.

The plan was a very effective method of forming a trust. For its present status, see § 411.

[3] Skinner v. Smith, 134 N. Y. 240 (1892); Bartholomew v. Derby Rubber Co., 69 Conn. 521 (1897).

[4] Dady v. Georgia, etc., Ry., 112 Fed 838 (1900).

§ 445. Combinations

This is a very general term embracing pooling agreements, trusts, the different forms of holding companies, and general associations to prevent competition, maintain prices, and limit production. The original plan of a board of trustees holding controlling interests in the corporations to be combined was held illegal.[5] Partnership agreements between corporations have likewise been held illegal.

The federal statutes and the statutes of almost every state in the Union prohibit and provide for punishment of combinations in restraint of trade or for purposes of preventing competition. It is difficult or impossible at the present time to form a legal combination to regulate prices. (See § 411.)

§ 446. Reorganization

Reorganization is generally employed as a means of rehabilitating a corporation that has failed or become financially embarrassed or entangled, when its name, property, franchises, trade-marks, or good-will are still worth saving. The term is loosely applied to various forms of consolidation, new incorporations, and similar arrangements.

Reorganization is not uncommon in the case of railroads and other public service corporations. The franchises of these corporations must usually be operated or they are lost, and stockholders and creditors are, as a rule, better satisfied to have the corporation continue in some reorganized form under which they still have an interest or recognized claim, even though reduced, than to permit the corporate assets to be sold for the inadequate prices of a forced sale, or the franchise to lapse for non-user.

Reorganization is also not infrequent in the case of insol-

[5] State v. Standard Oil, 49 Ohio 137 (1892); People v. North River Sugar Refining Co., 121 N. Y. 582 (1890).

[6] Bishop v. Am. Preservers Co., 157 Ill. 284 (1895); Mallory v. Oil Works, 86 Tenn. 598 (1888).

vent or embarrassed business corporations when the creditors consent to some adjustment or arrangement of their claims that will permit the corporate business to continue. The reorganization in such case may be limited to a mere issue of additional stock or bonds, or may extend so far as to be in effect a new incorporation.

If such reorganization is not possible and the business of the embarrassed corporation is of sufficient value, the usual plan pursued is for all or the principal stockholders of the old corporation to form a new and entirely distinct corporation. The property and business of the embarrassed corporation are then allowed to go to forced sale and are brought in as nearly in their entirety as possible by the new corporation. This latter then takes a clear title to these assets and conducts the business thereafter free from all claims of creditors or stockholders of the old corporation. A similar procedure is sometimes improperly employed in order to "freeze out" small or objectionable stockholders, the corporation being deliberately involved or allowed to be involved for the purpose.

§ 447. Dissolution

A corporation may be dissolved by the expiration of the term for which the charter was granted. This does not, however, often happen. If the corporation is active and prosperous, some form of reorganization or extension of the corporate existence is effected before the expiration of its charter period. If it is not profitable, it is usually dissolved or allowed to lapse long before its charter term expires.

A corporation may also be dissolved by insolvency. In such case a receiver may be appointed to dispose of its assets and divide the proceeds among its creditors, or the corporation may be allowed to go into bankruptcy and its affairs be wound up by a trustee. Even though a corporation is in-

solvent, it may be rescued from dissolution by an abatement of the creditors' claims, or by the contribution of additional capital by stockholders or others.

A corporation may always be dissolved and its affairs be wound up by proper procedure if all its stockholders consent. In many states a majority of the stockholders—and in some states less than a majority—may dissolve the corporation under some circumstances by prescribed statutory procedure.

Corporations destitute of assets are sometimes practically dissolved, or allowed to lapse by simply ceasing to transact business. Such corporations are not technically out of existence and in some cases their officers are still subject to liabilities. The procedure is, however, easy and inexpensive and many corporations end in this manner regardless of the possible liabilities of their officials.

Part XIII—Allied Forms of Organization

CHAPTER LVIII

JOINT-STOCK COMPANIES AND PARTNERSHIP ASSOCIATIONS

§ 448. Joint-Stock Companies

In the United States an unincorporated joint-stock company with its capital divided into transferable shares may be formed in the same manner as an ordinary partnership, merely by agreement of the parties. Except in the State of New York, no license is necessary, no public registry is prescribed, nor are formalities of any kind required. Such an association may issue transferable certificates of stock, and may provide against termination by reason of the death, withdrawal, or insolvency of one or more of its members. The association may designate agents to attend to its business and then only these authorized agents can do business for it. The members cannot act for it and bind it as in an ordinary partnership. The members of such a common-law, joint-stock company are, however, subject to full partnership liability.[1]

In New York any joint-stock association doing business in the state must, within sixty days after its formation, and thereafter in each January, file with the Secretary of State and with the county clerk a written certificate giving its name,

[1]Bates on Partnership, § 72; Farnum v. Patch, 60 N. H. 294 (1880); Carter v. McClure, 98 Tenn. 109 (1897); Hoadley v. Commissioners, 105 Mass. 519 (1870); Bank v. Dean, 124 Mass. 81 (1878); Edwards v. Warren Linoline, etc., Works and Trustee, 168 Mass. 564 (1897); Taber v. Breck, 102 Mass. 355 (1906); Frost v. Walker, 60 Me. 468 (1872); Wadsworth v. Duncan, 164 Ill. 360 (1897); Phillips v. Blatchford, 137 Mass. 510 (1884); Roberts v. Anderson, 226 Fed. 7 (1915).

date of organization, number of stockholders, names and residences of its officers, and its place of business. The statutes empower it under certain circumstances to hold real property in the name of its president, and it may mortgage such real estate by the same procedure as is required of a corporation. These organizations have come up before the courts of New York from time to time and it has been repeatedly held that "a joint-stock company is a partnership with some of the powers of a corporation."[2]

In People v. Coleman, 133 N. Y. 279 (1892), the court said of the National Express Company: "The company was formed as a joint-stock company or association in 1853 by a written agreement of eight individuals with each other, the whole force and effect of which, in constituting and creating the organization, rested upon the common law rights of the individuals and their power to contract with each other. The relation they assumed was wholly the product of their mutual agreement, and dependent in no respect upon the grant or authority of the state. It was entered into under no statutory license or permission, neither accepting nor designed to accept any franchise from the sovereign, but founded wholly upon the individual rights of the associates to join their capital in an enterprise in a relation similar to that of a partnership."

The joint-stock company form, while advantageous in many respects, is not extensively used, for the following reasons:

1. The members of the company are individually liable for its entire obligations.

2. While the company can do business under its company name, it cannot hold real property or convey the same by its collective name, the conditions requiring any deed or

[2] Hibbs v. Brown, 190 N. Y. 167 (1907); Matter of Jones, 172 N. Y. 575 (1902); Van Aernam v. Bleistein, 102 N. Y. 355 (1886).

encumbrance of real property to be executed by every member of the company, unless such real property is taken and held by some agent or officer as trustee for the company, when conveyances or encumbrances must be executed by this trustee.

3. The joint-stock company must bring suit in the names of the individuals composing it and, if it is sued, only those members who are served with process can be held.

In New York it is provided that any joint-stock company or association may sue or be sued in the name of the president or treasurer, and individual members shall not be sued until execution against the company has been returned unsatisfied. This provision seems to apply to all New York copartnerships of seven or more. It is not found in other states.[3]

Several of the leading express companies of the country are organized as joint-stock companies and in these cases the arrangement seems to have worked well. These companies have been before the courts many times and the cases will be found instructive.[4]

The common law joint-stock company has advantages over the ordinary partnership that should commend it in some cases at least, and particularly where the publicity and liability to taxation of the corporate form are objectionable. In many businesses the danger of partnership liability is too remote to trouble the members, and in such cases the joint-stock organization secures the same transferability and divisibility of interests as does the corporation, and also avoids the interruption often caused by the death of a partner. The joint-stock company could not usually be employed where stock is to be sold to investors, as these would not risk the

[3] Taft v. Ward, 106 Mass. 518 (1871). In the report of this case a full outline of the articles of association of the New England Express Co. is given.

[4] Chapman v. Barney, 129 U. S. 677 (1888); Express Co. v. State, 55 O. St. 69 (1896); Edgeworth v. Wood, 58 N. J. L. 463 (1896); Sanford v. Gregg, 58 Fed. 620 (1803); Gregg v. Sanford, 65 Fed. 151 (1895); Boston, etc., Railroad v. Pearson, 128 Mass. 445 (1879).

partnership liability involved. It could, however, be used in many cases as a substitute for the close corporation. In such case the articles of association should be carefully prepared, as—"The articles of association of an unincorporated joint-stock company bear the same relation to it that the charter bears to an incorporated company. They regulate the duties of the officers and the duties and obligations of the members of such a company among themselves."[5]

§ 449. Partnership Associations

In Pennsylvania and Michigan the statutes provide for the organization of what are termed "partnership associations." These have nothing in common with the voluntary associations of Massachusetts. They differ from a corporation only in the following particulars:

1. Interests in a partnership association may be transferred as provided by the rules and regulations of each association—in most cases, the association adopts the plan of stock certificates—but in case of a transfer the transferee must be elected a member of the association before he can vote or participate in the management. If he is not elected, the interest already transferred to him must be bought out at an agreed price, or, in default of such an agreement, an appraiser appointed by the court will appraise the same.

2. Originally no special fees or taxes were imposed upon these associations in the state where they were formed; but now in both Pennsylvania and Michigan organization fees similar to organization fees of corporations are prescribed.

In Pennsylvania, when a partnership association is to be formed, a statement answering in a general way to a certificate of incorporation must be made by three or more persons and filed with the recorder of deeds for the county. The filing fees are nominal, but a bonus of one-third of one per cent

[5] Bray v. Farwell, 81 N. Y. 600 (1880).

upon the amount of the capital stock must be paid to the State Treasurer.

In Michigan partnership associations were first authorized in 1877, and the provisions were as simple as in Pennsylvania.

In 1903 the legislature amended the law, and now the procedure for the formation of a voluntary association is similar to that for the organization of a corporation. As stated by the statute, three or more persons desiring to secure limited liability must sign and acknowledge a statement or articles of association giving their full names and the amount of capital subscribed by each; the total capital and when and where to be paid; the character of the business; its location; the name of the association followed by the word "limited"; its duration not exceeding twenty years; and the names of the officers. This statement is to be recorded in the offices of the Secretary of State and of the county clerk and a fee of one-twentieth of one per cent is to be paid on organization. Thereafter annual reports are to be made. In Michigan, for the protection of the minority, cumulative voting has been provided for in the election of managers.

In Pennsylvania the court characterized associations of this nature as "quasi corporations," stating that "technically they were not corporations but had many of the features of a corporation," and held that in ascertaining their legal status both the law of corporations and the law of partnerships should be resorted to according to the particular feature under consideration.[6]

In Michigan partnership associations are governed by the law of corporations rather than by the law of limited partnerships.[7]

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[6] Carter v. Producers' Oil Co., 182 Pa. St. 551, 563 (1897).

[7] Rouse, etc., Co. v. Detroit, etc., Co., 111 Mich. 251 (1896); s. c. 38 L. R. A. 794; Wood v. Sloman, 150 Mich. 177 (1907); Armstrong v. Stearns, 156 Mich. 597 (1909).

In a case in one of the Federal courts it was held that they were in effect corporations. The court said: "But these associations authorized by the Pennsylvania act of 1874 possess every attribute deemed essential to the existence of a corporation. . . . When organized, they constitute a new artificial person, endowed with the power of suing and being sued, and of acquiring, holding and conveying property in its artificial character. Created by compliance with the constating law, they can be dissolved only in the way pointed out by that law. Individual liability for corporate debts, beyond unpaid subscription to the capital stock, does not exist."[8]

This decision was later overruled by the Supreme Court of the United Sates, which refused to consider a partnership association under Pennsylvania laws as being anything more than a joint-stock company.[9]

In Massachusetts also, the Supreme Court refused to treat these partnership associations otherwise than as ordinary joint-stock companies and held that a Pennsylvania partnership association could not be sued under its associate name in the courts of Massachusetts, and approved the doctrine that "at common law a joint-stock company formed for business purposes, is considered in this commonwealth merely as a partnership."[10]

The partnership associations may be useful in the respective states which provide for their formation, but their legal status elsewhere is too uncertain for their use by businesses operating in other states. If the states of Pennsylvania and Michigan had lowered their corporate fees and taxes, and thus made the corporation form more generally available and attractive, they would have served all practical ends better than by the creation of a new form of nondescript business organization.

[8] Andrews Bros. v. Youngstown Coke Co., Ltd., 86 Fed. 585, 590 (1898).
[9] Great So. Hotel Co. v. Jones, 177 U. S. 449 (1899).
[10] Edwards v. Warren Linoline, etc., Works and Trustee, 168 Mass. 564 (1897).

§ 450. Syndicates and Joint Adventures

A syndicate is defined as an association of individuals formed for the purpose of conducting and carrying out some particular business transaction, ordinarily of a financial character, in which the members are mutually interested. It is as respecting the persons composing it a partnership, and the legal obligations assumed by the members are, as between themselves, substantially the same as those of an ordinary partnership.[1]

A joint adventure is simply a partnership limited in scope and duration by the fact that it applies to but a single business transaction. The liability of the co-adventurers is equal, and as to third parties is entirely independent of the amount advanced. The members of such a partnership may, of course, make any agreement between themselves they choose as to their respective investments, interests, and liabilities, but this does not affect their liability to third parties.

The members of a syndicate would undoubtedly be held liable to third parties as partners if the enterprise became absolutely insolvent. As most syndicates are formed for financial investments or underwritings, and either involve no obligations in excess of the amounts contributed, or, if otherwise, have well-defined and well-understood liability as to the syndicate transactions, and as the members of such syndicates are usually men or concerns of wealth and standing, the question of partnership liability rarely arises. If there were any danger of such liability it could probably be avoided by organization under a declaration of trust with express exclusion of individual liability.

[1] [illegible] Hamilton v. Rhind, 84 Md. 456 (1897); Howack v. Ottawa De [illegible] [illegible]

CHAPTER LIX

ASSOCIATIONS UNDER DEEDS OF TRUST

§ 451. Introductory

In a leading case in Massachusetts,[1] the court stated: "There is no intermediate form of organization between a corporation and a partnership like the joint-stock companies of England and of some of the United States, known to the laws of this Commonwealth. Since this association is not a corporation, its members must be partners."

As a matter of fact, since this statement was made Massachusetts has evolved an intermediate form of organization in the shape of its so-called "voluntary associations" which have been judicially defined as "business partnerships organized in the form of a trust." These associations have transferable shares and their shareholders avoid partnership liability. They certainly are not corporations, and they are not partnerships if the word is given its present legal definition.

The legislature of Massachusetts has recognized these associations by requiring them to file reports and by appointing a commission to investigate them and report as to what, if any, legislative action should be taken to regulate them. The Supreme Court of the United States has held that they are not required to report nor to pay taxes under the new Federal Corporation Tax Law[2] and it is possible that they may evolve into a widely used form of business association.

§ 452. Express Trusts

Various experiments have been tried at different times to form a permanent business organization in which trustees own

[1] Ricker v. Am. Loan and Trust Co., 140 Mass. 346, 348 (1885).
[2] Eliot v. Freeman, 220 U. S. 178 (1911).

and manage the business, and those interested are *cestuis que trust*. In the case of Cox v. Hickman, 8 H. of L. Cases 268 (1860) the highest authority in England decided that no partnership liability arises in cases where property is placed in the hands of trustees to manage for beneficiaries. This case has been followed in most of the states of this country to the extent of modifying the harsh rule that the sharing of profits is conclusive to establish partnership liability. It has not been followed as yet to the extent of introducing a new form of business organization.

The circumstances of Cox v. Hickman were as follows: The firm of B. Smith & Co., being financially embarrassed, entered into an arrangement with its creditors by which the business was thenceforth to be carried on by trustees under the name of the "Stanton Iron Company" and the creditors were to be paid out of the net income. A majority in value of the creditors were to make such rules as might be necessary for the conduct of the business, and were to discontinue it if they deemed it best. In conducting the business under this form, indebtedness was incurred to one Hickman and his draft was accepted in the name of the "Stanton Iron Company" by one of the trustees. Later, the Stanton Iron Company being unable to meet its obligations, it was sought to hold Cox—one of the original creditors of Smith & Co.—liable as a partner for the debts of the Stanton Iron Company, and on this contention the case was carried up to the House of Lords. Here the judges held that the relation of principal and agent did not exist between the creditors of Smith & Co. and the trustees who were operating the Stanton Iron Company, and that these creditors were not liable as partners for the debts of the Iron Company.

In England, Cox v. Hickman was followed by the case of Smith v. Anderson, L. R. 15, Ch. D. 247, 284 (1879), in which the organization was from the first in the form of an

express trust. The court said: "The trustees here are the only persons who are dealing with the investments, and they are dealing not as agents for some principal, but as trustees in whom the property and the management of it are vested, and who have the power of changing the investments and securities. That is just like the case which often occurs where executors or trustees of a will are directed to carry on a business. The fact that they are to account to others for the profits made is a matter utterly immaterial as between them and those with whom they deal."

In the United States the same doctrine has been held in many cases.[3] These are all cases of express trusts and come under the usual rules governing trustees; i.e., the trustees are personally liable on their contracts unless there is a special agreement that only the trust property shall be held liable.[4] They deal as principals, not as agents, and they have full title to and control of the property and act and sue and are sued in their own names as trustees. As stated by a recent writer:[5] "Debts incurred under the trust are but the personal debts of the trustees, who are not agents, but are the absolute owners and principals. The trustees have to account of course to the beneficiaries, but the beneficiaries have no partnership powers."

The same writer says further: "Express trusts, whether created under wills, deeds of settlement, assignments for the benefit of creditors, receiverships, or by special declarations of trust to manage property or carry on business, are neither corporations nor joint-stock companies nor partnerships, but they employ a distinct and the highest known method of administration."

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[3] Hart v. Seymour, 147 Ill. 598 (1893); Mallory v. Russell, 71 Iowa 63 (1887); Mason v. Pomeroy, 151 Mass 164 (1890); Mayo v. Moritz, 151 Mass. 481 (1890); Johnson v. Lewis, 6 Fed. 27 (1881); Taylor v. Davis, 110 U. S. 330 (1884); Lackett v. Rumbaugh, 45 Fed. 23-29 (1891); Wells-Stone Mercantile Co. v. Grover, 7 N. D. 460 (1898); 41 L. R A. 252; Spotswood v. Morris, 12 Idaho 360 (1906); s. c., 6 L. R. A. (N. S.) 665.

[4] Perry on Trusts, p. 437a.

[5] Chanler on Express Trusts.

The express trust has incurred a certain amount of odium because it was the form under which the large industrial combinations were brought into being, so that the word "trust" came to have a new and unpopular signification. "The Standard Oil Trust," "The Sugar Trust," and "The Bay State Gas Company" were each organized as an express trust, in which a board of trustees took over the stocks of the constituent companies and issued trust certificates to the owners. Thereafter, until the courts declared such organizations illegal, these boards of trustees dominated their respective industries. The courts decided that trusts of this nature were illegal, not because of any objection to their form of organization, but because their objects were illegal.

When the trust form was forbidden to these monopolies, holding corporations or large owning corporations were resorted to, but the name "trust" persisted and is still used to designate the great monopolistic corporations. This is as illogical as it would be to call large partnerships "corporations," and has accordingly resulted in much confusion of popular thought and judgment. The word "trust" has been debased to an unpopular and incorrect significance.

§ 453. Voluntary Associations in Massachusetts

In Massachusetts business organizations under deed or declaration of trust have become numerous under the title of "voluntary associations." They are similar in their general form to the express trust, though the courts of Massachusetts have refused to recognize them as such. Their development is largely due to the fact that prior to 1912 the laws of Massachusetts made no provision for corporations to deal in and develop real estate. A form of business organization that could engage in such undertakings without involving its membership in the onerous liabilities of a partnership was needed, and the development of the voluntary association followed.

The real estate trusts of Boston now own not less than $250,000,000 in real property.

The voluntary association proved so satisfactory for real estate purposes that it has been extended to a limited degree into manufacturing, mercantile, and other lines of activity, and it may become a popular form of business organization.

The characteristic features of these voluntary associations are as follows:

1. A deed or declaration of trust, drawn up to define the rights and powers of trustees and shareholders.
2. Two or more trustees who are authorized to take over and manage the capital, business, or other property supplied by the shareholders.
3. Shareholders who receive transferable certificates representing their respective interests in the profits and in the property on dissolution.
4. Provisions for division of profits, appointment of trustees to fill vacancies, and for dissolution at termination of the trust.

It is usual to provide in the deed of trust that no liability is to attach to the shareholders or trustees.

§ 454. Nature of the Voluntary Association

The voluntary association of Massachusetts first came up for judicial cognizance in the case of Hoadley v. County Commissioners, 105 Mass. 519, 526 (1870). In this case the court said: "The McKay Sewing Machine Association is not a corporation. It has never received an act of incorporation, nor been organized as a corporation under the general laws. A corporation can be created and exist only by sanction of the Legislature. This is a voluntary association of individuals, and its articles of agreement, although they adopt some of the forms of managing the business usual in corporations,

constitute a copartnership. It cannot sue and be sued as a corporation; its members are individually liable for its debts; and it has none of the special attributes which belong to a corporation duly organized under our laws. . . . The provision that each member may sell and transfer his interest, and thus introduce a new partner, though unusual, is not inconsistent with the contract of copartnership." The decision gives a synopsis of the articles of the deed of trust.

The same organization came up again in Gleason v. McKay, 134 Mass. 419 (1883), when the court decided that the association was a partnership and not a corporation, and that a statute taxing its shares was unconstitutional.

In most of the other cases in which this form of organization has come before the Massachusetts courts, it has been held that the voluntary association is "a business partnership organized in the form of a trust."[6] This is ambiguous and unsatisfactory as a legal definition.

When the New England Car Trust came before the court[7] it was held that—"The Car Trust was not a corporation. It was a mere voluntary association. There is no intermediate form of organization between a corporation and a partnership like the joint-stock companies of England and of some of the United States, known to the laws of this Commonwealth. Since this association is not a corporation, its members must be partners."

Generally it is held that, "There is nothing inconsistent with an association being a partnership, that it has shares, or that the shares are transferable, or that the death of a member shall not work a dissolution." This doctrine has been affirmed many times.[8]

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[6] Taber v. Breck, 192 Mass. 355 (1906); Phillips v. Blatchford, 137 Mass. 510 (1884); Williams v. Boston, 208 Mass. 497 (1911).

[7] Ricker v. American Loan & Trust Co., 140 Mass. 346, 348 (1885).

[8] Edwards v. Warren Linoline, etc., Works and Trustee, 168 Mass. 564, 567 (1897); Merchants' Nat. Bank v. Wehrmann, 202 U. S. 295 (1906); Phillips v. Blatchford, 137 Mass. 510 (1884); Tabor v. Breck, 192 Mass. 355 (1906).

In other cases it has been decided that such a trust does not create a perpetuity, even when dealing with land, and is not an illegal restraint on alienation.[9]

The instrument creating these so-called voluntary associations is termed an indenture of trust, or declaration of trust.[10]

§ 455. Liability Under the Voluntary Association

The following clause, or an equivalent, is commonly used in the declaration of trust by which voluntary associations are brought into being to prevent any possibility of liability attaching to the trustees or shareholders:

"In every written order, contract, or obligation which a trustee shall give or enter into, it shall be the duty of the trustee to stipulate that neither the trustee nor the shareholders shall be held to any liability under or by reason of such order, contract, or obligation."

While the Massachusetts courts have usually refused to consider voluntary associations as express trusts, holding them "business partnerships organized in the form of a trust," they nevertheless seem to consider that they have effectually avoided partnership liability for their shareholders in all cases where the declaration of trust expressly disclaims such liability.

In Hussey v. Arnold, 185 Mass. 202 (1904), the court discussed "The Boston Associates" organized under a deed of trust to deal in certain real property. The deed of trust provided for three trustees who were to conduct the business and hold the property. These trustees could be removed at any time and the trust be terminated by a three-fourths vote (in value) of the shareholders, but otherwise it was to last twenty

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[9] Howe v. Morse, 174 Mass. 491 (1899); Hart v. Seymour, 147 Ill. 598 (1893); Mallory v. Russell, 71 Iowa 63 (1887).

[10] A form of declaration of trust will be found in Howe v. Morse, 174 Mass. 491 (1899).

years after the death of the last subscriber. Shares were $100 each and were transferable. Subscribers were liable for their subscriptions but were relieved from further liability by the following provision:

"All contracts and engagements entered into by the trustees shall be in their names as trustees, and shall provide against any personal liability on the part of the trustees, and shall stipulate that no other property shall be answerable than the property in the hands of the trustees."

The association became insolvent and suit was brought for coal furnished. Commenting on the provisions of the deed of trust the court said:

"The agreement creating the trust has peculiar provisions. The object of it, apparently, was to obtain for the associates most of the advantages belonging to corporations, without the authority of any legislative act, and with freedom from the restrictions and regulations imposed upon corporations. . . . . We have already said that the subscribers were not to be liable to third persons, and it would seem therefore that the business of the trust was intended to be done in a way that would give no one dealing with it a right to bring action at law against anybody to enforce any contract or liability of the association."

As will be seen from the preceding quotation, the judge's comments were cautious and non-committal. It was held, however, that the trustees were not liable personally in the action for coal furnished, and "as agents and trustees under the agreement they were not authorized to contract any debt which should charge the certificate holders."

In Shoe and Leather Bank v. Dix, 123 Mass. 148 (1877), the court held that the trustees who had signed a note "We, as trustees and not individually, promise to pay, etc." could not be held personally liable.

In Williams v. Boston, 208 Mass. 497 (1911), the court

held that, if the relations of the shareholders to the trustees was that of *cestuis que trust,* the interest of each in the trust would be taxable where he lived, instead of in the City of Boston, where the business was situated, and hence there were reasons of policy why the members should be held to be partners for purpose of taxation—a frank but somewhat unusual basis for a judicial decision on an important matter.

In Mayo v. Moritz, 151 Mass. 481, 484 (1890), the court had before it a transfer under a deed of trust of certain patent rights to trustees with provision for the sale of scrip to raise money to exploit the rights. The trustee under the name of the Loeber Pneumatic Engine Co. rented premises in Boston. The landlord attempted to hold the scrip-holders liable. The court said: "The deed of trust does not have the effect to make the scrip-holders partners. *It does not contemplate the carrying on of a partnership business upon the joint account of the grantor and the scrip-holders.* . . . The scrip-holders are *cestuis que trust,* and are entitled to their share of the avails of the property when the same is sold. . . . If the trustees contracted a debt to the plaintiff, they are liable for it personally, and an action at law may be maintained by him against them."

In this case, it will be seen that the court decided according to the English doctrine that such an association is not a partnership but an *express trust.*

It is to be noted in the first cases involving the status of members of voluntary associations that, where the trust instrument contained no provision relieving the shareholders from liability, the courts held the members liable as partners.[11] In the later cases, the declaration of trust usually provided that the shareholders were not to be liable, and the courts took it for granted that in the face of this express provision they could not be bound. On the other hand, in the case of Mayo

[11] Hoadley v. County Commissioners, 105 Mass. 519 (1870).

v. Moritz, already cited, the court held it to be an express trust, and decided on that account that the scrip-holders were not liable.

The question whether an express trust can be created to carry on an industrial or mercantile enterprise in Massachusetts, in which the shareholders would be *cestuis que trust* and hence not liable as partners, cannot be answered in the affirmative from the decisions of the courts.

§ 456. Regulation of Voluntary Associations

Within the last few years voluntary associations have attracted much attention in Massachusetts and have been the subject of several legislative acts.

In 1907 it was provided that such an association must file the names of its trustees and a reference to the instrument or declaration of trust under which it did, or was to do, business, in the office of the clerk of the city or town in which its place of business or offices were situated.[12]

In 1909 it was provided that, "Trustees of a voluntary association under a written instrument or declaration of trust the beneficial interest under which is divided into transferable certificates of participation or shares, shall file a copy of such written instrument or declaration of trust with commissioner of corporations and with clerk of every city or town in which such association has a place of business." [13]

The Massachusetts Legislature in 1911 directed the Commissioner of Corporations to investigate the growth of these voluntary organizations and to report to the Legislature. In his report submitted January 17, 1912, the Commissioner said:

"The characteristics assumed by these associations which, it is commonly said, resemble the attributes of a corporation

[12] Acts 1907, Ch. 539.
[13] Acts 1909, Ch. 441.

are the following. They are to be found in all the more recent forms of instruments creating these associations.

1. Transferability of shares.
   (a) Without effecting the dissolution of the organization.
   (b) Without giving the shareholders the right to an accounting.
   (c) Without giving the shareholders any right or interest in the property of the concern.
2. The limited liability of the shareholder for the debts of the concern.

The transferable nature of these shares gives to these associations a continuity of duration usually limited by express provisions to the lives of the subscribers and twenty years thereafter. This provision differentiates the form of association from an ordinary partnership, where the death of a partner dissolves the partnership and makes it, to a limited extent, similar to a corporation which may or may not have perpetual duration."

The report also states in further characterization of the voluntary association that a shareholder has no right to an accounting, as in a partnership, nor any right to examine the books as in a corporation; that a shareholder is not a tenant in common and has no interest in the property of the trust; that a shareholder is not responsible for the debts of the association; and that a provision is frequently inserted to be made part of every contract that neither shareholders nor trustees are to be liable.

§ 457. Liability to Taxation

In Gleason v. McKay, 134 Mass. 419 (1893), it was decided that a statute attempting to tax the transferable shares of voluntary associations was unconstitutional. In a later case,

commenting upon this decision the court said: "As the tax considered in Gleason v. McKay was not upon a business or employment, and as there was no franchise or privilege conferred by the Legislature, the distinction between partnerships with transferable shares and those without rendered the tax unequal and unreasonable, because it was a discrimination founded upon an immaterial fact."[14]

In Massachusetts the Legislature can call upon the justices of the highest court to give their opinion as to the power of the Legislature to enact proposed legislation. Pursuant to inquiry made of them the justices submitted a report—found in 196 Mass. 603-627—covering a number of matters of more or less importance. One of the questions propounded involved the taxability under the Massachusetts Constitution of shares in these voluntary associations. Four of the justices deemed such shares taxable and three were of the contrary opinion.

In the Massachusetts Income Tax Law enacted in 1916, the Legislature has tried to equalize the taxation somewhat. Under this law dividends of national banks and corporations, foreign as well as domestic, paying a franchise tax in Massachusetts are exempted from the tax, and the income of corporations is not taxable. On the other hand, dividends or shares in associations and trusts having transferable shares are taxable, except in certain cases where the income of the association in trust would be exempt if received by an individual, or where the trustees or managers agree to pay the tax. Where the dividends on transferable shares are not taxable, the income of associations or trusts is taxable if derived from annuities, professions, employments, trade, or business. The transfer of shares in associations having transferable shares is made taxable by the Massachusetts Stock Transfer Tax Law.

When the Federal Corporation Tax was enacted, it was

[14] Minot v. Winthrop, 162 Mass. 113, 122 (1894).

sought to tax voluntary associations. The cases were carried before the Supreme Court, and, in deciding against the power of the government to impose the tax, Justice Day said:

"Entertaining the view that it was the intention of Congress to embrace within the corporation tax statute only such corporations and joint-stock associations as are organized under some statute or derive from that source some quality or benefit not existing at the common law, we are of opinion that the real estate trusts involved in these two cases are not within the act."[15]

§ 458. Advantages of the Voluntary Association

The Commissioner of Corporations of Massachusetts in closing his report summarizes the advantages afforded by these voluntary associations as follows:[16]

1. The experience of twenty-five years shows that they furnish a convenient, safe, and unobjectionable form of co-operation, ownership, and management.

2. Their form of management is more flexible, more economical, and more convenient than that of a corporation. Trustees can do business with more ease and rapidity than a board of directors.

3. In particular they afford a convenient form for combining capital for the development and improvement of real estate, as the form of organization insures a continuity of management and control that specially appeals to investors in real estate, and which cannot be secured by a corporation on account of the change of officers each year. Trustees are not changed as frequently as are directors of a corporation.

The Commissioner stated that where such associations sought capital in the open market they should be subjected to the same publicity requirements as corporations.

[15] Eliot v. Freeman, 220 U. S. 178 (1911). See Sears on Effective Substitutes for Incorporation, 1911.

[16] Report of Massachusetts Tax Commissioners upon Voluntary Associations, January 17, 1912.

CHAPTER LX

PLAN FOR STOCK PARTNERSHIP

§ 459. A Suggested Form of Partnership

A partnership has certain qualities of effectiveness which under some circumstances make it superior to every other form of business organization. During the investigation of the Steel Trust, Mr. Carnegie made the following statement:

"I don't believe that any corporation can manage a business like a partnership. When we were partners I felt that we could run around corporations. You take thirty-five young men interested in watching even a leak in a spigot, and no corporation can compete with such an organization in any business."

It would seem that if a form of organization could be devised that in ordinary business would combine the desirable features of both the corporation and the partnership, it would be more efficient than either. In any business organization there are two elements of management and investment, but the relations to the business of those who furnish the capital and those who direct the business are absolutely different.

Those who have the control and direction of an enterprise should not object to the element of partnership responsibility. Those who merely invest the capital should not be required to assume any liability beyond the amount they invest.

If directors in corporations were required to take the risk of partners in ordinary businesses, it would at one stroke remove the most objectionable features of present corporate management. Directors would really direct, and would not dare to lend their names where they could not also give their personal oversight and business ability.

The same end might be attained if it were so arranged that investors could put money into partnership enterprise, and, while risking their investment, assume no partnership liability. It is hardly to be doubted that under existing laws it is possible to devise such an organization in which the actual managers will be partners and subject to partnership responsibility, while those who merely furnish the capital and do not manage may participate in profits without participating in partnership liability. Under such conditions these investors would be safer and better protected than is the stockholder of the ordinary corporation.

§ 460. Plan for Suggested Form of Partnership

The following suggested organization provides for a managing partnership body issuing profit-sharing debentures for sale to investors:

1. *As to the Managing Partners*: An ordinary partnership may be formed as the basis of the organization, in which the managers of the business enter into the usual partnership relations. If it is desirable, this basic partnership could be organized with transferable shares, as is done in the usual joint-stock company. It is well established that a partnership with transferable shares to represent the partners' interests is legal, and the arrangement secures one of the most popular features of the corporate form. "The provision that each member may sell and transfer his interest, and thus introduce a new partner, though unusual, is not inconsistent with the contract of partnership."[1] "There is nothing inconsistent with an association being a partnership that it has shares, or that the shares are transferable, or that the death of a member shall not work a dissolution."[2]

[1] Hoadley v. Co. Commissioners, 105 Mass. 519 (1870); Bank v. Dean, 124 Mass. 81 (1878); Carter v. McClure, 98 Tenn. 109 (1897).

[2] Edwards v. Warren Linoline, etc., Works, 168 Mass. 564 (1897); Taber v. Breck, 192 Mass. 355 (1906); Phillips v. Blatchford, 137 Mass. 510 (1884); Merchants' Nat. Bank v. Wehrman, 202 U. S. 295 (1906), and authorities cited in this last case.

Partnership liability is not avoided by the introduction of transferable shares into the partnership, but for active members, personally engaged in the business and able to watch their several interests, this feature should not be objectionable. On the other hand, the existence of this liability is of much advantage to the public and to those who are investors but not partners in the business.

2. *Provisions for Investors.* The smaller investors who furnish the money for business enterprises usually cannot or do not care to trouble themselves with the management. Such investors should not be required to take a partnership risk when their sole function is to furnish capital. Usually investors of this class prefer corporate stocks and bonds as the safest and most convenient form of investment open to them. An equally safe and convenient partnership security, if free from partnership liability, would appeal to them more strongly. If, then, a partnership were organized along the lines suggested, with the active partners taking the partnership responsibility, and when this was done debentures were issued in sums of $100 or some multiple of $100, *these debentures drawing interest and participating in profits,* an exceptionally attractive investment offering would be the result. The purchasers of such securities would have no voice or part in the management of the partnership business, but would likewise have no liability for the partnership obligations. So far from being members of the firm, or partners in the business, they would be creditors. In event of insolvency, their position would be better than that of stockholders in a corporation.

There is apparently no legal obstacle in the way of the issuance of such participating debentures. It has been decided many times that an agreement to give a share of the profits as compensation for the loan of money does not make the creditor a partner or liable to other creditors of the firm.[3]

[3] See 18 L. R. A. (N. S.) 963, note and cases there cited.

In Hackett v. Stanley, 115 N. Y. 625, 629 (1889), the court said: "We think that the division of profits must still be considered the most important element in all contracts by which the true relation of parties to a business is to be determined. . . . Exceptions to the rule are, however, found in cases where a share of profits is contracted to be paid, as a measure of compensation to employees for services rendered in the business, *or for the use of moneys loaned in aid of the enterprise.* . . . It cannot be disputed but that a loan may be made to a partnership firm on conditions by which the lenders may secure a limited or qualified interest in certain profits of the firm without making them partners."

In Meehan v. Valentine, 145 U. S. 611, 623 (1892), the leading case on this subject, the court said:

"In whatever form the rule is expressed, it is universally held that an agent or servant, whose compensation is measured by a certain proportion of the profits of the partnership business, is not thereby made a partner, in any sense. So an agreement that the lessor of a hotel shall receive a certain portion of the profits thereof by way of rent, does not make him a partner with the lessee. . . . *And it is now equally well settled that* the receiving of part of the profits of a commercial partnership, *in lieu of or in addition to interest,* by way of compensation for a loan of money, has of itself no greater effect.

. "Throughout the original agreement and the renewals thereof, the sum of $10,000 paid by Perry to the partnership, and for which they gave him their promissory notes, is spoken of as a loan, for which the copartnership has to pay him legal interest at all events, and also pay him one-tenth of the net yearly profits of the partnership business if those profits should exceed the sum of $10,000. The manifest intention of the parties, as apparent upon the face of the agreements, was to create the relation of debtor and creditor, and not that of

partners. Perry's demanding and receiving accounts and payments yearly was in accordance with his right as a creditor. There is nothing in the agreement itself, or in the conduct of the parties, to show that he assumed any other relation. He never exercised any control over the business.[4]

It must be noted, however, that where an alleged loan is only a cover for a partnership investment, partnership liability cannot be avoided by the simple expedient of calling it a loan. The test as to whether any particular advance of money to a partnership is a loan or an investment, is usually whether the so-called lender takes part in the management of the business, exercises control over its property or operations, or has a proprietary interest in the firm assets.[5] The participating debentures would, it is obvious, easily stand this test. Then owners would not be partners nor liable as partners.

§ 461. Advantages of Suggested Form of Partnership

In conclusion it may be said that in accordance with the foregoing suggestions it would be feasible to form a partnership composed of three to five or more active members, the interests of these active members being represented by transferable certificates showing the investment of each in the business. The active members would be equal in the management of the business and would practically occupy the position and exercise the power of a board of directors.

Additional capital required could then be supplied by the sale of profit-sharing debentures issued in multiples of $100,

[4] See also Wilson v. Edmonds, 130 U. S. 472 (1889); 18 L. R. A. (N. S.) 1055, note; Richardson v. Hughitt, 76 N. Y. 55 (1879); Wisotzkey v. Insurance Co., 112 A. D. (N. Y.) 599 (1906); Miller v. Simpson, 107 Va. 476 (1907); Cudahy Packing Co. v. Hibou, 92 Miss. 234 (1908); s. c., 18 L. R. A. (N. S.) 975; Cadenasso v. Antonelle, 127 Cal. 382 (1899); Waverly Bank v. Hall, 150 Pa. 466 (1892); Wessels & Co. v. Weiss & Co., 166 Pa. 490 (1895), (in Pennsylvania in such case there must be a written agreement); Boston, etc., Smelting Co. v. Smith, 13 R. I., 27 (1880), (in this case there is a discussion of the English cases and the written agreement is set out in full).

[5] Wood v. Valette, 7 O. St. 172 (1857); Fougner v. Nat. Bank, 141 Ill. 124 (1892); Hawkins v. Campbell, 48 A. D. (N. Y.) 43 (1900); Magovern v. Robertson, 116 N. Y. 61 (1889); Russell v. Herrick, 127 A. D. (N. Y.) 503. This last case was reversed on the dissenting opinion, in 195 N. Y. 586 (1909).

drawing interest and entitling the holders to share in the profits, but not involving them in partnership obligations.

There is no direct precedent for such an organization as this, but there is precedent for the several essential features and there is no legal obstacle to their combination. Any organization of the kind should, of course, be formed under the direction of competent legal counsel and with due regard to local laws and decisions. If properly constituted it would result in an exceedingly equitable and effective business organization, having the following advantages:

1. The managing body—corresponding to the directors of a corporation—would be a partnership in which all the members had equal power and equal representation and personal liability.

2. The interests of these partners would be represented by transferable certificates of interest having all the convenience of corporate stock.

3. The fact of the managers being also partners and subject to every liability of partners, would effectually insure the vital interest of each in the business. There could be nothing analogous to the dummy directors, or directors who merely loan their names, so familiar in the corporation.

4. The facts (a) that the managers are liable as partners, and (b) that the investors are not partners and not stockholders, but are on the better protected plane of creditors, would, when this was once understood, make it easier to secure capital than is the case under the ordinary irresponsible corporate organization.

5. The debenture-issuing partnership, as a voluntary organization would secure immunity from the many taxes and reports, and the undue publicity which now attaches to the corporate form.

If such a form of business organization were adopted, it would be necessary, until its legal status had become es-

tablished by adjudication, to have the aid of competent local counsel in each case. Such counsel should, in addition to the usual professional attainments, have some initiative and not be too slavishly dominated by fealty to precedent. He should have skill to adapt and vary the proposed form to the needs of the particular business and to the requirements of any local statutes that might affect it. Likewise he should be able to bring the organization into harmony with the attitude of the courts of the special state on questions of partnership law.

BOOK V

FORMS AND PRECEDENTS

CHAPTER LXI

CHARTER FORMS

Form 1. Delaware Charter

CERTIFICATE OF INCORPORATION

of the

WILMINGTON BISCUIT COMPANY

First—The name of this corporation shall be

"WILMINGTON BISCUIT COMPANY"

Second—The location of its principal office in the State of Delaware shall be in the City of Wilmington, County of Newcastle. The agent in charge thereof shall be Philip L. Farnsworth.

Third—The objects and purposes for which this corporation is formed are to do any and all of the things herein set forth, as fully and to the same extent as natural persons might or could do, and in any part of the world, viz.:

(a) To manufacture, buy, sell, pack, prepare, and generally to deal in and with biscuits, crackers, cakes, Italian paste, confectionery, cereals, coffees, teas, dried fruits, and foods and food products and materials of all kinds, either raw or manufactured, that may be used in foods and food products and beverages, or for the packing, adapting, preparing, or preserving of such foods, food products, or beverages; and generally to mix, adapt, refine, prepare, preserve, manufacture, and dispose of all such goods, wares, merchandise, and materials, either in original packages or in such cans, jars, boxes, cartons, or other containing packages as may be found desirable.

(b) To purchase, lease, or otherwise acquire lands, buildings, tenements, and factories in Delaware or elsewhere, for the plants, offices, workshops, warehouses, laboratories, and manufactories of the Company, and to purchase, lease, or otherwise acquire tools, implements, engines, machinery, apparatus, fixtures, and conveniences of all kinds for the manufacture, manipulation, preparation, preservation, packing, and handling of the materials and products of the Company.

(c) To apply for, obtain, purchase, lease, or otherwise acquire, and to register, hold, own, and use any and all trade-marks, trade secrets, processes, formulæ, inventions, and improvements capable of being used in connection with the work of the Company, whether secured under letters of patent in the United States, or elsewhere or otherwise; and to use, operate, and manufacture under the same,

and to sell, assign, grant licenses in respect of or otherwise dispose of and turn the same to the account and profit of the Company.

(d) To do any and all things set forth in this certificate as objects, purposes, powers, or otherwise to the same extent and as fully as natural persons might do, and in any part of the world, as principals, agents, contractors, trustees, or otherwise, and either alone or in company with others.

(e) To have offices, conduct its business, and promote its objects within and without the State of Delaware, in other States, the District of Columbia, the territories and colonial dependencies of the United States, and in foreign countries, without restriction as to place or amount.

Fourth—The amount of the total authorized capital stock of this corporation is Five Hundred Thousand Dollars ($500,000), divided into Five Thousand (5,000) Shares of the par value of One Hundred Dollars ($100) each.

The amount of capital stock with which this corporation will commence business is the sum of One Thousand Dollars ($1,000).

Fifth—The names and places of residence of each of the original subscribers to the capital stock, and the number of shares subscribed for by each, are as follows:

NAMES	RESIDENCES	NO. OF SHARES
Francis G. Fawcett	Pittsburgh, Pa.	3
Randolph C. Blythe	Pittsburgh, Pa.	3
A. C. Bentley	Philadelphia, Pa.	4

Sixth—The existence of this corporation shall be perpetual.

Seventh—The private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever.

Eighth—In furtherance, and not in limitation of the powers conferred by statute, the Board of Directors are expressly authorized:

To make, alter, amend, and repeal the by-laws; to fix the amount to be reserved for working capital, and to authorize and cause to be executed mortgages and liens, without limit as to amount upon the property and franchises of this corporation.

With the consent in writing, and pursuant to a vote of the holders of a majority of the capital stock issued and outstanding to dispose, in any manner, of the whole property of this corporation.

To determine from time to time whether and to what extent the accounts and books of this corporation, or any of them, shall be open to the inspection of the stockholders; and no stockholder shall have any right of inspecting any account, or book, or document of this corporation, except as conferred by law, or the by-laws, or by resolution of the stockholders.

The stockholders and directors shall have power to hold their meetings and keep the books, documents, and papers of the corporation outside of the State of Delaware, at such places as may be from time to time designated by the by-laws or by resolution of the stockholders or directors except as otherwise required by the laws of Delaware.

It is the intention that the objects, purposes, and powers specified in the third paragraph hereof shall, except where otherwise expressed in said paragraph, be nowise limited or restricted by reference to or in inference from the terms of any other clause or paragraph in this certificate of incorporation, but that the objects, purposes, and powers specified in the third paragraph and in each of the clauses or paragraphs of this charter shall be regarded as independent objects, purposes, and powers.

We, the undersigned, being all the original subscribers to the capital stock hereinbefore named, for the purpose of forming a corporation under the laws of the State of Delaware, do make, file, and record this certificate, and do certify that the facts herein stated are true; and we have accordingly hereunto set our respective hands and seals, this sixteenth day of March, A. D. 1917.

FRANCIS G. FAWCETT [SEAL]
RANDOLPH C. BLYTHE [SEAL]
A. C. BENTLEY [SEAL]

In presence of
GEORGE S. LORD
FRANK E. BROWN

STATE OF DELAWARE
COUNTY OF NEWCASTLE } *ss.*:

Be It Remembered, that on this sixteenth day of March, A. D. 1917, personally came before me, Thomas L. King, a Notary Public in and for the county and state aforesaid, Francis G. Fawcett, Randolph C. Blythe, and A. C. Bentley, parties to the foregoing certificate of incorporation, known to me personally to be such, and severally acknowledged the said certificate to be the act and deed of the signers respectively, and that the facts therein stated are truly set forth.

Given under my hand and seal of office the day and year aforesaid.

{ NOTARIAL SEAL }

THOMAS L. KING,
Notary Public

Form 2. New Jersey Charter (U. S. Steel Corp.)

AMENDED CERTIFICATE OF INCORPORATION
of
UNITED STATES STEEL CORPORATION

We, the undersigned, in order to form a corporation for the purposes hereinafter stated, under and pursuant to the provisions of the Act of the Legislature of the State of New Jersey, entitled "An Act Concerning Corporations (Revision of 1896)," and the acts amendatory thereof and supplementary thereto, do hereby certify as follows:

I—The name of the corporation is

"UNITED STATES STEEL CORPORATION"

II—The location of its principal office in the State of New Jersey is

at No. 51 Newark street, in the City of Hoboken, County of Hudson. The name of the agent therein and in charge thereof, upon whom process against the corporation may be served, is Hudson Trust Company. Said office is to be the registered office of said corporation.

III—The objects for which the corporation is formed are:

To manufacture iron, steel, manganese, coke, copper, lumber, and other materials, and all or any articles consisting or partly consisting of iron, steel, copper, wood, or other materials, and all or any products thereof.

To acquire, own, lease, occupy, use or develop any lands containing coal or iron, manganese, stone or other ores, or oil, and any woodlands, or other lands, for any purpose of the company.

To mine or otherwise to extract or remove coal, ores, stone and other minerals and timber from any lands owned, acquired, leased or occupied by the company, or from any other lands.

To buy and sell, or otherwise to deal or to traffic in iron, steel, manganese, copper, stone, ores, coal, coke, wood, lumber and other materials and any of the products thereof, and any articles consisting or partly consisting thereof.

To construct bridges, buildings, machinery, ships, boats, engines, cars and other equipment, railroads, docks, slips, elevators, water works, gas works and electric works, viaducts, aqueducts, canals and other waterways, and any other means of transportation, and to sell the same, or otherwise dispose thereof, or to maintain and operate the same, except that the company shall not maintain or operate any railroad or canal in the State of New Jersey.

To apply for, obtain, register, purchase, lease or otherwise to acquire, and to hold, use, own, operate and introduce, and to sell, assign, or otherwise to dispose of, any trademarks, trade names, patents, inventions, improvements and processes used in connection with or secured under letters patent of the United States, or elsewhere, or otherwise; and to use, exercise, develop, grant licenses in respect of, or otherwise turn to account any such trademarks, patents, licenses, processes and the like, or any such property or rights.

To engage in any other manufacturing, mining, construction or transportation business of any kind or character whatsoever, and to that end to acquire, hold, own and dispose of any and all property, assets, stocks, bonds and rights of any and every kind, but not to engage in any business hereunder which shall require the exercise of the right of eminent domain within the State of New Jersey.

To acquire by purchase, subscription or otherwise, and to hold or to dispose of stocks, bonds, or any other obligations of any corporation formed for, or then or theretofore engaged in or pursuing any one or more of the kinds of business, purposes, objects or operations above indicated, or owning or holding any property of any kind herein mentioned, or of any corporation owning or holding the stocks or the obligations of any such corporation.

To hold for investment, or otherwise to use, sell or dispose of, any stock, bonds or other obligations of any such other corporation; to aid in any manner any corporation whose stock, bonds or other obligations are held or are in any manner guaranteed by the company, and to do any other acts or things for the preservation, pro-

tection, improvement or enhancement of the value of any such stock, bonds or other obligations, or to do any acts or things designed for any such purpose; and, while owner of any such stock, bonds or other obligations, to exercise all the rights, powers and privileges of ownership thereof, and to exercise any and all voting power thereon.[1]

The business or purpose of the company is from time to time to do any one or more of the acts and things herein set forth; and it may conduct its business in other States and in the Territories and in foreign countries, and may have one office or more than one office, and keep the books of the company outside of the State of New Jersey, except as otherwise may be provided by law; and may hold, purchase, mortgage and convey real and personal property either in or out of the State of New Jersey.

Without in any particular limiting any of the objects and powers of the corporation, it is hereby expressly declared and provided that the corporation shall have power to issue bonds and other obligations in payment for property purchased or acquired by it, or for any other object in or about its business; to mortgage or pledge any stock, bonds or other obligations, or any property which may be acquired by it, to secure any bonds or other obligations by it issued or incurred; to guarantee any dividends or bonds or contracts or other obligations; to make and perform contracts of any kind and description; and in carrying on its business, or for the purpose of attaining or furthering any of its objects, to do any and all other acts and things, and to exercise any and all other powers which a copartnership or natural person could do and exercise, and which now or hereafter may be authorized by law.

IV—The total authorized capital stock of the corporation is eleven hundred million dollars ($1,100,000,000), divided into eleven million shares of the par value of one hundred dollars each. Of such total authorized capital stock five million five hundred thousand shares, amounting to five hundred and fifty million dollars, shall be preferred stock, and five million five hundred thousand shares, amounting to five hundred and fifty million dollars, shall be common stock.

From time to time the preferred stock and the common stock may be increased according to law, and may be issued in such amounts and proportions as shall be determined by the Board of Directors and as may be permitted by law.

The holders of the preferred stock shall be entitled to receive, when and as declared, from the surplus or net profits of the corporation, yearly dividends at the rate of seven per centum per annum and no more, payable quarterly on dates to be fixed by the by-laws. The dividends on the preferred stock shall be cumulative, and shall be payable before any dividends on the common stock shall be paid or set apart; so that, if in any year dividends amounting to seven per cent shall not have been paid thereon, the deficiency shall be payable before any dividends shall be paid upon or set apart for the common stock.

Whenever all cumulative dividends on the preferred stock for all previous years shall have been declared and shall have become payable,

[1] The power to purchase, hold, and vote stock in other corporations has been limited by amendments of "An Act Concerning Corporations," § 51; see L. 1913, Ch. 18, and L. 1915, Ch. 114.

and the accrued quarterly installments for the current year shall have been declared, and the company shall have paid such cumulative dividends for previous years and such accrued quarterly installments, or shall have set aside from its surplus or net profits a sum sufficient for the payment thereof, the Board of Directors may declare dividends on the common stock, payable then or thereafter, out of any remaining surplus or net profits.

In the event of any liquidation or dissolution or winding up (whether voluntary or involuntary) of the corporation, the holders of the preferred stock shall be entitled to be paid in full both the par amount of their shares and the unpaid dividends accrued thereon before any amount shall be paid to the holders of the common stock and, after the payment to the holders of the preferred stock of its par value and the unpaid accrued dividends thereon, the remaining assets and funds shall be divided and paid to the holders of the common stock according to their respective shares.

V—The names and post-office addresses of the incorporators, and the number of shares of stock for which severally and respectively we do hereby subscribe (the aggregate of our said subscriptions, being three thousand dollars, is the amount of capital stock with which the corporation will commence business), are as follows:

Name	Post-Office Address	NUMBER OF SHARES PREFERRED STOCK	COMMON STOCK
Charles C. Cluff	51 Newark St., Hoboken, N. J.	5	5
William J. Curtis	51 Newark St., Hoboken, N. J.	5	5
Charles MacVeagh	51 Newark St., Hoboken, N. J.	5	5

VI—The duration of the corporation shall be perpetual.

VII—The number of Directors of the company shall be fixed from time to time by the by-laws; but the number, if fixed at more than three shall be some multiple of three. The Directors shall be classified with respect to the time for which they shall severally hold office by dividing them into three classes, each consisting of one-third of the whole number of the Board of Directors. The Directors of the first class shall be elected for a term of one year; the Directors of the second class for a term of two years, and the Directors of the third class for a term of three years and at each annual election the successors of the class of Directors whose terms shall expire in that year shall be elected to hold office for the term of three years, so that the term of office of one class of Directors shall expire in each year.

The number of Directors may be increased as may be provided in the by-laws. In case of any increase of the number of the Directors the additional Directors shall be elected as may be provided in the by-laws by the Directors or by the stockholders at an annual or special meeting and one-third of their number shall be elected for the then unexpired portion of the term of the Directors of the first class, one-third of their number for the unexpired portion of the term of the Directors of the second class, and one-third of their number for the unexpired portion of the term of Directors of the third class, so that each class of Directors shall be increased equally.

In case of any vacancy in any class of Directors through death, resignation, disqualification or other cause, the remaining Directors, by affirmative vote of a majority of the Board of Directors, may elect

successor to hold office for the unexpired portion of the term of the Director whose place shall be vacant, and until the election of a successor.

The Board of Directors shall have power to hold their meetings outside of the State of New Jersey, at such places as from time to time may be designated by the by-laws or by resolution of the Board. The by-laws may prescribe the number of Directors necessary to constitute a quorum of the Board of Directors, which number may be less than a majority of the whole number of the Directors.

Unless authorized by votes given in person or by proxy by stockholders holding at least two-thirds of the capital stock of the corporation, which is represented and voted upon in person or by proxy at a meeting specially called for that purpose or at an annual meeting, the Board of Directors shall not mortgage or pledge any of its real property, or any shares of the capital stock of any other corporation; but this prohibition shall not be construed to apply to the execution of any purchase-money mortgage or any other purchase-money lien. As authorized by the Act of the Legislature of the State of New Jersey, passed March 22, 1901, amending the 17th section of the Act Concerning Corporations (Revision of 1896), any action which theretofore required the consent of the holders of two-thirds of the stock at any meeting after notice to them given, or required their consent in writing to be filed, may be taken upon the consent of, and the consent given and filed by the holders of two-thirds of the stock of each class represented at such meeting in person or by proxy.

Any officers elected or appointed by the Board of Directors may be removed at any time by the affirmative vote of a majority of the whole Board of Directors. Any other officer or employee of the company may be removed at any time by vote of the Board of Directors, or by any committee or superior officer upon whom such power of removal may be conferred by the by-laws or by vote of the Board of Directors.

The Board of Directors, by the affirmative vote of a majority of the whole Board, may appoint from the Directors an executive committee, of which a majority shall constitute a quorum; and to such extent as shall be provided in the by-laws, such committee shall have and may exercise all or any of the powers of the Board of Directors, including power to cause the seal of the corporation to be affixed to all papers that may require it.

The Board of Directors, by the affirmative vote of a majority of the whole Board, may appoint any other standing committees, and such standing committees shall have and may exercise such powers as shall be conferred or authorized by the by-laws.

The Board of Directors may appoint not only other officers of the company, but also one or more Vice-Presidents, one or more Assistant Treasurers, and one or more Assistant Secretaries; and to the extent provided in the by-laws the persons so appointed respectively shall have and may exercise all the powers of the President, of the Treasurer and of the Secretary, respectively.

The Board of Directors shall have power from time to time to fix and to determine and to vary the amount of the working capital of the company; and to direct and determine the use and disposition of any surplus or net profits over and above the capital stock paid in; and in its discretion the Board of Directors may use and apply any such surplus or accumulated profits in purchasing or acquiring its bonds or other obligations, or shares of its own capital stock, to such extent and in such manner and upon such terms as the Board of Directors shall deem ex-

pedient; but shares of such capital stock so purchased or acquired may be resold, unless such shares shall have been retired for the purpose of decreasing the company's capital stock, as provided by law.

The Board of Directors from time to time shall determine whether and to what extent, and at what times and places, and under what conditions and regulations, the accounts and books of the Corporation, or any of them, shall be open to the inspection of the stockholders, and no stockholder shall have any right to inspect any account or book or document of the Corporation, except as conferred by statute or authorized by the Board of Directors, or by resolution of the stockholders.

Subject always to by-laws made by the stockholders, the Board of Directors may make by-laws, and from time to time may alter, amend or repeal any by-laws, but any by-laws made by the Board of Directors may be altered or repealed by the stockholders at any annual meeting, or at any special meeting, provided notice of such proposed alteration or repeal be included in the notice of the meeting.

IN WITNESS WHEREOF, we have hereunto set our hands and seals the 23rd day of February, 1901.

CHARLES C. CLUFF [L. S.]
WILLIAM J. CURTIS [L. S.]
CHARLES MACVEAGH [L. S.]

Signed, sealed and delivered in the presence of
FRANCIS LYNDE STETSON
VICTOR MORAWETZ

(*Form of acknowledgment for New Jersey charter is given below*)

STATE OF NEW JERSEY
COUNTY OF HUDSON } *ss.*:

Be It Remembered, that on this.....day of....., A. D....., before the undersigned personally appeared..... ..... and ..... who I am satisfied are the persons named in and who executed the foregoing certificate, and I, having first made known to them and each of them the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed.

In New Jersey acknowledgments of charters are usually taken before a Chancellor, a Justice of the Supreme Court, a Master in Chancery, or an attorney at law, though a number of other state and county officials are empowered thereto. Outside the state, acknowledgments are preferably taken before a Master in Chancery or a Commissioner of Deeds for New Jersey. A New Jersey notary cannot take acknowledgments.

Form 3. New York Charter

CERTIFICATE OF INCORPORATION

of the

MIDVALE REALTY CORPORATION

We, the undersigned, all being of full age and two-thirds being citizens of the United States and one of us a resident of the State of New York, for the purpose of forming a corporation under the **Business** Corporations Law of the State of New York, do hereby certify and set forth:

First—The name of said corporation shall be

"MIDVALE REALTY CORPORATION"

Second—The purposes for which said corporation is to be formed are as follows:

(*Purposes omitted*)

Third—The amount of capital stock of said corporation shall be One Million Dollars ($1,000,000).

The amount of capital with which said corporation will begin business is One Thousand Dollars ($1,000).

Fourth—The number of shares of which said capital stock is to consist shall be Ten Thousand (10,000) shares, of the par value of One Hundred Dollars ($100) each.

Of said capital stock Five Thousand (5,000) Shares, of the par value of Five Hundred Thousand Dollars ($500,000) shall be cumulative preferred stock, entitled to an annual dividend of six per cent (6%) from the profits of the corporation, payable semiannually, on the tenth days of January and July in each year, before any dividends are paid upon the common stock, and to share equally with the common stock in any excess paid in any year above six per cent (6%) to all the stock, and in the event of liquidation or dissolution from any cause said preferred stock shall be entitled to be paid in full from the assets of the corporation before any thing is paid to the common stock. The holders of such preferred stock shall not be entitled to vote in any meeting of the stockholders or election of directors, unless the accumulated dividends due and unpaid such preferred stock at the time shall equal or exceed fifteen per cent (15%) of the par value of said stock.

Of said capital stock Five Thousand (5,000) Shares, of the par value of Five Hundred Thousand Dollars ($500,000) shall be common stock of the corporation.

Fifth—The principal business office of said corporation shall be located in the Borough of Manhattan and in the City, County, and State of New York.

Sixth—The duration of said corporation shall be perpetual.

Seventh—The number of directors of said corporation shall be five.

Eighth—The names and post-office addresses of the directors of said corporation for the first year are as follows:

(*Names and addresses of directors omitted.*)

Ninth—The names and post-office addresses of the subscribers to this certificate, and the number of shares which each agrees to take in said corporation are as follows:

NAMES	ADDRESSES	SHARES
John B. Clark	203 Broadway, New York City	1
Charles F. Holbrook	Mount Vernon, N. Y.	1
Douglas Raymond	212 Madison Ave., New York City	1

Tenth—At all elections of directors of this corporation each stockholder shall be entitled to as many votes as shall equal the number of his shares of stock, multiplied by the number of directors to be elected, and he may cast all of such votes for a single director or may distribute them among the number to be voted for, or any two or more of them, as he may see fit.

IN WITNESS WHEREOF, we have made and signed this certificate in duplicate this 13th day of November, one thousand nine hundred and seventeen.

JOHN B. CLARK
CHARLES F. HOLBROOK
DOUGLAS RAYMOND

STATE OF NEW YORK
COUNTY OF NEW YORK } *ss.*:

Personally appeared before me this 13th day of November, 1917, John B. Clark, Charles F. Holbrook, and Douglas Raymond, to me personally known to be the persons described in and who executed the foregoing certificate and severally acknowledged that they executed the same for the purposes therein set forth.

{ NOTARIAL SEAL }

HENRY F. SHERWOOD,
Notary Public for
New York County

Form 4. New York Charter—Stock Without Par Value

CERTIFICATE OF INCORPORATION

of

JOSSCELYN FILM SUPPLY CORPORATION

We, the undersigned, all being persons of full age, and at least two-thirds being citizens of the United States, and at least one being a resident of the State of New York, desiring to form a corporation pursuant to the provisions of the Business Corporation Law of the State of New York, do hereby certify and set forth:

1. The name of the proposed corporation is

"JOSSCELYN FILM SUPPLY CORPORATION"

2. The purposes for which it is to be formed are:

To purchase, hire, borrow, or acquire in any manner, and to sell, let, transfer or in any wise dispose of film for use in motion picture

cameras and motion picture film of any and every sort and property of any and all kinds necessary or accessory to the use of such film, or pertaining in any way to the motion picture business.

To purchase, hire, and acquire any interest of any kind whatsoever in personal property of any and every character, and deal in personal property of any and every description, and to let or pledge or create any other estate or interest in or encumbrance upon personal property.

To acquire the good-will, rights, and property of any persons, firms, associations, or corporations engaged in any similar business whatsoever.

To apply for, obtain, purchase, or otherwise acquire, and to sell, lease, or otherwise dispose of patents and applications therefor, inventions, licenses, trade-marks, and copyrights, and similarly to purchase or acquire and to sell or otherwise dispose of secret processes, and to use, exercise, develop, or create licenses in respect of and otherwise to turn to account such patents or applications therefor, secret processes, licenses, trade-marks, and copyrights.

To act as agent, representative, or factor for any individual, firm, partnership, association, or corporation in transacting, conducting, and promoting the business of such individual, firm, partnership, association, or corporation, and to acquire, possess, enjoy, encumber, and dispose of real and personal property of any name, nature, and description, whether corporeal or incorporeal, and wheresoever situated, necessary, or desirable for the purposes of its business.

To purchase, acquire, hold, and dispose of stocks, bonds, and other evidences of indebtedness of corporations wheresoever organized, and to pay for the same in cash or in property or by the issuance of its own stock, bonds, or other obligations, to exercise in respect thereto all of the rights, powers, and privileges of individual owners or holders thereof, and to exercise all voting powers thereon.

To purchase or otherwise acquire shares of its own capital stock, and to hold or dispose of the same or to retire the same, subject, however, to all provisions of law.

To transact any or all of its business outside of the State of New York, and at any place or at one or more places within the United States of America, Dominion of Canada, and in any other part of the world, and the corporation shall have all the power to accomplish any and all of its objects and purposes which a natural person would have.

3. The number of shares of capital stock that may be issued by said corporation is Three Thousand (3,000) shares, of which Fifteen Hundred (1,500) shares of the amount or par value of One Hundred Dollars ($100) each are to be preferred stock, and Fifteen Hundred (1,500) shares which shall have no nominal or par value are to be common stock.

4. The holders of the preferred stock of the corporation shall be paid from the surplus profits an annual, cumulative, seven per cent dividend, before any dividend is paid to the holders of common stock or other disposition is made of such profits, but shall not participate in any further dividends. In event of dissolution or liquidation of the corporation from any cause, the holders of preferred stock shall be paid, from the assets of the corporation, the par value of their stock and any unpaid

arrearages of dividends before any part of said assets shall be paid to the holders of common stock. The holders of said preferred stock shall not be entitled to vote at any meetings of the stockholders.

5. The amount of capital with which the corporation will carry on business, shall be Three Hundred Thousand Dollars ($300,000).

6. The shares of the capital stock of said company may be issued for cash or for property, but no share of the capital stock shall be issued for less than One Hundred Dollars ($100) in cash, unless two-thirds of the Board of Directors, at a meeting called for that purpose in such manner as shall be prescribed by the by-laws shall so direct.

7. The principal office of said corporation is to be located in the Borough of Manhattan, New York City, County and State of New York.

8. The duration of said corporation is to be perpetual.

9. The number of directors is to be ten.

10. The names and post office addresses of the directors for the first year are as follows:

NAME	POST-OFFICE ADDRESS
Henry A. Davis	203 Broadway, New York City
John H. Williams	203 Broadway, " " "
Henry B. Nivens	198 Broadway, " " "
John H. Sharp	275 Fulton St., " " "
Harry J. Andrews	55 Liberty St., " " "

11. The names and post-office addresses of the subscribers to this certificate, and a statement of the number of shares which each agrees to take in the corporation, are as follows:

NAME	POST-OFFICE ADDRESS	NO. OF SHARES
Henry A. Davis	203 Broadway, New York City	1
John H. Williams	203 Broadway " " "	1
Henry B. Nivens	198 Broadway, " " "	1

IN WITNESS WHEREOF, the parties hereto have made, signed, acknowledged, and filed this certificate the 18th day of December, 1917.

HENRY A. DAVIS
JOHN H. WILLIAMS
HENRY B. NIVENS

STATE OF NEW YORK
COUNTY OF NEW YORK } *ss.*:

Personally appeared before me this 18th day of December, 1917, Henry A. Davis, John H. Williams, and Henry B. Nivens, to me personally known to be the persons described in and who executed the foregoing certificate and severally acknowledged that they executed the same for the purposes therein set forth.

{ NOTARIAL SEAL }

JOHN E. CLARK,
Notary Public for
New York County

CHAPTER LXII

SPECIAL CHARTER CLAUSES

The lines of business directly covered by the special charter clauses of the present chapter are shown in the following index list.

INDEX LIST OF SPECIAL PURPOSE CLAUSES

1. Amusement Devices
2. Bonds and Securities
3. Brick Machinery
4. Building Materials
5. Cement and Building Materials
6. Cloaks and Garments
7. Clothing Manufacturers
8. Contracting and Building
9. Cotton and Textile Fibres
10. Dairy, Garden and Farm Products
11. Department Store and Mail Order
12. Drugs
13. Dry Goods
14. Electrical Supply Company
15. Engineering—Mechanical
16. Estate, Management of
17. Express and Delivery
18. Furniture
19. Gas and Electric Fixtures
20. Hardware
21. Heating Apparatus
22. Hotel
23. Ice Company
24. Insurance Agents
25. Inventions
26. Jewelry
27. Leather
28. Lighting and Heating
29. Locks
30. Lumber
31. Meat and Cattle
32. Metal Working
33. Mining
34. Mining
35. Mining and Exploration
36. Mining and Manufacturing
37. Oil
38. Opticians
39. Paints and Painters' Supplies
40. Patents
41. Periodical or Newspaper
42. Photographic Apparatus
43. Pianos and Musical Instruments
44. Printing
45. Railroad Construction
46. Real Estate
47. Refrigerating Company
48. Scales and Weighing Machines
49. Schools
50. Securities Company
51. Sugar Business
52. Textile Fibres
53. Tobacco
54. Toilet Specialties

The charter purpose clauses of the present chapter cover a number of representative lines of business. Where any desired business is not covered, it will in most cases be possible to find among those given, some related or similar purpose clauses that can be adapted to meet the particular requirements.

The clauses as given cover the specific purposes of particular businesses. It is usual, as will be seen by reference to the charters of the preceding chapter, to include in the ordinary charter other clauses giving general powers in addition to the specific purposes. As a corporation always has power to do such legitimate things as are necessary to effect the purposes of its creation, these additional clauses are not as a rule strictly necessary but may be added where desired.

Form 5. Special Purpose Clauses

1—Amusement Devices

(a) To make, instal, and operate, in the State of New York, certain devices, mechanisms, and apparatus for amusement and recreation, invented by Ward L. Donaldson.

(b) To make, lease, purchase, and otherwise acquire, and to use operate, sell, and license to use, all manner of devices, apparatus and constructions for the purpose of amusement and recreation.

(c) To purchase, lease, exchange, and otherwise acquire any and all rights, permits, privileges, franchises, and concessions suitable or convenient for the purposes of the Company.

2—Bonds and Securities

(a) To buy, sell, exchange, pledge, mortgage, and generally deal in and with government, municipal, and industrial bonds, stocks, and other securities, and in and with bonds and mortgages or other evidences of indebtedness or ownership of any individual, firm, or corporation, and in and with stocks, debentures, trust receipts, and other securities of corporations, both domestic and foreign; and while the owner thereof to exercise the rights and privileges of ownership, including the right to vote thereon, and to issue in exchange therefor its own stock, bonds, and other obligations, and generally to carry on the business of stock and bond brokers; but nothing herein shall be construed as an attempt to secure powers not properly obtainable by corporations organized under the Business Corporation Law of the State of New York.

(b) To deposit in trust with any person, firm, or corporation or corporations, any or all of said bonds, stocks, or other securities, and issue against such securities collateral trust gold notes in any denomination that may be deemed desirable by the directors of the company.

(c) To buy, sell, rent, lease, or otherwise acquire, to hold, own, use, improve, mortgage, sell, exchange, lease, or otherwise dispose of real property, improved, or unimproved.

(d) To register and certify, or to guarantee, the genuineness or authenticity of, or the payment of the principal or interest of any bonds, notes or debentures of any person, firm, corporation, or association so far as the same may be permitted by corporations organized under the act under which this company is incorporated.

(e) To borrow money with or without pledge of or mortgage on all

or any of its property, real or personal, as security, and to loan and advance money upon mortgages on personal and real property or on either of them.

3—Brick Machinery

(a) To secure for the State of New York rights to manufacture, use, operate, sell, lease, and otherwise dispose of the brick-pressing mechanism and machinery invented and patented by James D. Warner.

(b) To make, manufacture, buy, sell, and generally to deal in and with brick, tile, and all other sand, lime, clay, cement, earthen, mineral and composition wares, materials, and manufactures.

(c) To purchase, lease, or otherwise acquire lands, kilns, depots, buildings, warehouses, factories, rights, inventions, machinery, and plants in the State of New York and elsewhere, for the purpose of conducting and carrying on such manufactures and business.

(d) To erect or have erected, to construct or have constructed, houses, works, buildings, store-rooms, tenements, edifices, and structures of every description, and to rebuild, enlarge, improve and alter existing houses, works, buildings, store-rooms, tenements, edifices, and structures of every description.

(e) To buy, sell, exchange, dig, mine, excavate, prepare, manufacture, and generally to deal in and with all raw and manufactured substances, minerals, and materials, necessary or convenient for the uses, manufactures, and operations of the corporation, and to sell, exchange, and otherwise dispose of and turn to account all products and manufactures resulting from the same.

4—Building Materials

To make, manufacture, buy, sell, import, export, and generally deal in and with cement, clay, stone, brick, tile, and all other earthen, mineral, metal, and construction materials, and with wares, blocks, and manufactures, and constructions made thereof, and to deal generally in and with all kinds of building and construction materials, supplies, tools, and machinery.

5—Cement and Building Materials

(a) To manufacture, buy, sell, and generally to deal in and with cement, lime, plaster, and artificial stone; and to erect or purchase or lease kilns, store houses, factories, warehouses, and other structures necessary for the conduct of said business, and for the manufacture and storing of such materials and for other structural materials, supplies, and the implements and tools useful in connection therewith.

(b) To acquire, own, hold, lease, maintain, establish, and operate quarries, brickyards, lime kilns, cement and plaster mills, and furnaces, factories, and establishments for the manufacture, preparation, production, and adaption of all kinds of structural material and supplies, and for the manufacture and repair of any and all machinery, tools, implements, vehicles, elevators, apparatus, and appliances used in or necessary in the prosecution of the said work, business, and undertaking of the corporation.

6—Cloaks and Garments

(a) To manufacture cloaks, kimonas, dressing sacques, negligees, gowns, robes, waists, skirts, and all kinds of garments and wearing apparel for men, women, and children.

(b) To buy, sell, import, export, manufacture, and generally deal in and with all kinds of textile fabrics, dry goods, clothing, ornaments, notions, fancy goods, novelties, devices, goods, wares, merchandise, and commodities.

7—Clothing Manufacturers

(a) To conduct and carry on the business of cutting out, making, and preparing clothing and wearing apparel of all kinds, and of all other articles which may be conveniently or advantageously handled in connection with the aforesaid business.

(b) To buy, sell, import, export, and deal in and with woolen, cotton, silk, and other textile fabrics, and in any and all other materials useful or necessary in the manufacture of clothing and wearing apparel.

8—Contracting and Building

(a) To make, enter into, perform, and carry out contracts for building, erecting, improving, constructing, altering, repairing, decorating, finishing and furnishing houses, buildings, warehouses, store-rooms, edifices, works, tenements, and structures of every kind and description; to carry on in all their respective branches the business of builders, contractors, decorators, and such other trades and businesses as pertain to or are connected with the general business of building and construction.

(b) To take over, acquire, purchase, own, sell, lease, hire, hold, control, manage, maintain, and operate quarries, brick-yards, lime-kilns, refineries, asphalt, cement and plaster mills, lumber yards, timber lands, saw mills, glass, metal and woodworking plants, pulp and paper mills, furnaces, factories, and establishments for the manufacture, preparation, and production of building supplies, material, furnishings, decorations, and furniture; and to buy, sell, and generally deal in and with all such articles and materials.

(c) To act as agents, factors, brokers, commission merchants, carriers, contractors, builders, architects, decorators, surveyors, engineers, appraisers, lessees, managers of estate, or otherwise in entering into, undertaking, performing, and carrying out and conducting any and all things set forth in this certificate as objects, purposes, or powers that it may do for itself; and to exercise its powers to the same extent that natural persons might do, and in any part of the world to the full extent permitted to corporations organized under the Business Corporations Law of the State of New York.

9—Cotton and Textile Fibres

(a) To carry on the business of buying, selling, storing, ginning, baling, compressing, shipping, and otherwise dealing in and with cotton of all kinds; and of making, producing, refining, adapting, preparing, buying, selling, storing, and otherwise dealing in and with cotton seed oils and other oils; and of buying, selling, storing, and otherwise dealing in and with cotton seed; and in making, adapting, preparing, buying, selling, storing, and otherwise dealing in and with all products and by-products of cotton and cotton seed, and in utilizing the same to the profit and advantage of the corporation.

(b) To grow, purchase, deal in and with, manufacture, prepare for market, and market, cotton, flax, hemp, wool, silk, and other fibrous materials of all kinds; to manufacture, deal in and with all the products and by-products of said materials and all articles or products or by-

products consisting in part of such materials, or any products or by-products thereof; to bleach, dye, print, and otherwise manipulate and treat in such manner as may be desired, and spin, comb, weave, and prepare for market, either wholly or in part, and market and deal in any of such materials, products, by-products or articles; and to do all things and engage in any and all kinds of business and in all parts of the world which in the opinion of the corporation may be necessary, ancillary, incidental, profitable, or proper to or in connection with said business or any portion thereof.

(c) To buy, sell, manufacture, operate, and generally deal in and with any and all devices, machinery, and apparatus for ginning, baling, compressing, preparing, or otherwise manufacturing or treating cotton, flax, hemp, wool, silk, and other fibrous or other materials; and to do all business connected with and collateral thereto, including the selling, shipping, and warehousing of the products.

(d) To erect, construct, and equip cotton storage warehouses and general warehouses, and to purchase and lease the same, or rights to or interests therein, and to conduct the business of storage and warehousing, and all the business necessarily or impliedly incidental thereto or profitable in connection therewith, and to further carry on the business of general warehousing in all its several branches; to construct, purchase, or otherwise acquire, and to operate and maintain, all or any means of conveyance for the transportation by land or by water of any and all products, goods, or manufactured articles of the corporation; to issue negotiable certificates, debentures, warrants, and other evidences of indebtedness upon commodities stored in the corporation's warehouses and to persons warehousing goods with the corporation; and to make advances or loans of its own funds or as the agent for others upon the security of such goods or otherwise; to manufacture, sell, and trade in all materials, apparatus, and appliances usually dealt in by warehousemen; and generally to carry on and undertake any business undertaking, transaction, or operation commonly carried on or undertaken by warehousemen, or any business which may, in the opinion of the corporation, be necessary, ancillary, incidental, profitable, or proper to or in the carrying on of said business or any part thereof, without any restrictions whatsoever.

10—Dairy, Garden, and Farm Products

(a) To buy, sell, and generally deal in and with milk; to condense, preserve, evaporate, and manufacture butter, cheese, and other milk products; to sell and handle fresh milk, eggs, butter, and all kinds of garden, farm, and dairy products; and to deal generally in and with food products of every kind and description, including cereals and cereal products, meats, fish, vegetables, fruit of all kinds or preserved goods, and all kinds and descriptions of food preparations.

(b) To lease, build, purchase, or otherwise acquire store houses, packing houses, canning factories for handling and storing milk, butter, cheese, eggs, vegetables, poultry, and all other food, farm and dairy products, and to sell or otherwise dispose of the product of such packing houses and factories.

(c) To conduct and carry on any other business, manufacturing or otherwise, which may seem advantageous or useful in connection with the general business of the company, and to manufacture, market, or prepare for market, any goods or commodities which the company may use in connection with its business.

(d) To protect the products of the company by trade-marks, trade-names, or any distinguishing name or title, and to acquire and take over any trade-marks, patent rights, processes, formulæ, and apparatus useful or convenient in the conduct of the said business of the corporation.

11—Department Store and Mail Order

(a) To establish, conduct, and carry on the general business of a department store and mail-order business; and in connection therewith to carry on all or any of the trades and businesses of dry goods merchants, cloth manufacturers, furriers, haberdashers, hosiers, milliners, dress-makers, cloak-makers, mantua-makers, tailors, hatters, clothiers, furnishers, outfitters, glovers, lace manufacturers, feather-dressers, boot and shoemakers, saddlers, harness-makers, cabinet-makers, upholsterers, jewelers, gold and silversmiths, watch and clock-makers, booksellers, restaurant keepers, tobacconists, cigar makers, confectioners, barbers, hairdressers, photographers, printers, publishers, engravers, stationers, decorators, chemists, druggists.

(b) Generally to buy, sell, import, export, manufacture, and deal in and with textile fabrics, leather goods, household and office furniture ironmongery, hardware, tools, implements, machinery, china, glassware, crockery, pottery and utensils, notions, fancy goods, soaps, perfumery, drugs, medicines, chemicals and toilet articles, precious stones, jewelry, ornaments, watches, clocks, plated goods, foods, groceries, meats, fish, vegetables, fruits, provisions, supplies, dairy products, candies, confections, books, periodicals, pictures, works of art, bicycles, motor cycles, automobiles, motor boats, sporting goods, photographic supplies, domestic, trained and fancy animals and birds, and all kinds and descriptions of goods, wares, and commodities.

(c) To advertise generally in all manner and by all legitimate methods; to carry on the business of printing, publishing, engraving, bookbinding, designing, and producing and reproducing printing, writing, drawing, and impressions of all kinds; to buy, sell, manufacture, and deal generally in and with paper, envelopes, books, periodicals, magazines and advertising, printed and duplicated materials of all kinds, and with all supplies, stationery, and materials useful in connection with the business of advertising, printing, and publishing.

(d) To apply for, obtain, purchase, lease, or otherwise acquire, and to register, hold, own, use, operate, and manufacture under, and to sell, assign, grant licenses in respect of, or otherwise dispose of and turn to account and profit, any and all trade-marks, improvements, processes, formulæ, trade secrets, rights, franchises, licenses, inventions, contrivances, devices, appliances, brands, labels, patterns and models, whether secured under letters patent in the United States or in any foreign country, or otherwise or in any other manner.

12—Drugs

(a) To prepare, compound, manufacture, buy, sell, import, export, and generally deal in and with drugs, medicines, chemicals, perfumeries, soaps, toilet articles, druggists' sundries, wines, liquors, mineral and soda waters, proprietary articles, electrical and surgical apparatus, physicians' and hospital supplies, and all kinds of pharmaceutical, chemical, and medicinal preparations, compounds, and materials.

(b) To conduct and carry on in all its branches the business of chemists, druggists, and manufacturers and dealers in medical, chemi-

cal, pharmaceutical and other compounds, preparations, and materials, and in all supplies, devices, machinery, apparatus, and implements used in such business or in connection therewith.

13—Dry Goods

To buy, sell, import, export, and to deal generally in and with all kinds of textile goods, wares and merchandise; and to prepare, manufacture and deal in all kinds of dry goods, cloths, and textile fabrics and garments and other manufactures of the same; and to conduct and carry on the general wholesale and retail dry goods and white goods business in all its branches; and to conduct and carry on any form of manufacturing or mercantile enterprise necessary or incidental to the general business of the company.

14—Electrical Supply Company

(a) To manufacture, prepare, construct, erect, install, and build electrical devices, motors, dynamos, meters, supplies, apparatus, machinery, improvements, appliances, and plants of all descriptions; and to buy, sell, import, export, and generally deal in and with the same, and all tools, stock, supplies, and material useful in connection therewith.

(b) To carry on the business of electrical and mechanical engineers; to design, construct, enlarge, repair, improve, and manufacture all kinds of plants, engines, and machines; generally to work and operate as toolmakers, brass founders, metal workers, millwrights, machinists, iron and steel converters, smiths, builders, metallurgists; to buy, sell, repair, manufacture, and deal in machinery, implements, rolling stock, and hardware of all kinds; and to build, construct, and repair railroads, water, gas, and electric works, bridges, viaducts, piers, and works and structures of all kinds.

15—Engineering—Mechanical

(a) To conduct and carry on the business of mechanical engineers, and to design and construct plants, engines, machines, tools, and apparatus of all kinds.

(b) To manufacture, buy, sell, and generally deal in tools, implements, and machinery and hardware of all kinds.

(c) To operate and do business as tool makers, brass founders, metal workers, millwrights, machinists, smiths, builders, and mechanical engineers.

16—Estate, Management of

To take over and acquire all or any part or interest in the estate and property of John C. Howard, deceased; to assume the payments of any notes, indebtedness, or obligations of such estate; and to hold, improve, lease, sell, and otherwise handle and dispose of the said estate and property as may appear to the advantage and profit of the corporation.

17—Express and Delivery

(a) To collect, receive, distribute, and deliver goods, merchandise, parcels, packages, baggage, and express matter, and to do a general cartage and delivery business in the City of Greater New York and elsewhere; to contract with express or railroad or other companies for the

collection, transportation, or distribution of goods, merchandise, freight and express matter in said city and elsewhere, and to perform all such contracts.

(b) To buy, sell, manufacture, and otherwise acquire, and to use, repair, store, operate, lease, let out, and otherwise employ and utilize cars, trucks, wagons, and other vehicles and conveyances designed for the carriage and transportation of goods, freight, and merchandise of all kinds.

(c) To do a general trucking and expressing business; to receive, handle, ship, forward, and transport goods, wares, merchandise, and freight of all kinds by land or water.

18—Furniture

(a) To manufacture, buy, sell, export, import, exchange, and generally deal in and with all kinds of house, store, office, and other furniture, carpets, curtains, fixtures, and furnishing goods.

(b) To engage generally in the business of furnishing, decorating, improving, and altering rooms, houses, stores, offices, and all kinds of halls, buildings, and apartments.

(c) To purchase, lease, or otherwise acquire and hold lands, buildings, tenements, and factories for the offices, workshops, and store-rooms of the company, and to lease, mortgage, and convey such real estate in such manner as may appear for the best interests of the company.

19—Gas and Electric Fixtures

(a) To manufacture, buy, sell, import, export, and generally deal in and with gas and electrical fixtures, lamps, lamp shades, globes, pendants, chandeliers, lambrequins, and gas and electrical attachments of all kinds.

(b) To buy, sell, import, export, prepare, and utilize glass, wood, metal, cloths, silks, leathers, and other materials for the manufacture of such gas, lamp, and electrical fixtures, and to do all things necessary or convenient in connection with such utilization.

20—Hardware

(a) To buy, sell, import, export, and generally deal in and with all kinds of tools, hardware, and machinery; to establish, maintain, and operate shops and factories for the manufacture and construction of all kinds of tools, hardware, machines, and mechanical construction.

(b) To buy, sell, and generally to deal in iron, steel, manganese, copper, zinc, brass, and other metals, and in any and all articles made of or partly consisting of metal, wood, and other materials, and to engage in the repair and manufacture of all goods, wares, and commodities dealt in by the corporation.

21—Heating Apparatus

(a) To manufacture gas, oil, and electric stoves, heating apparatus, cooking apparatus, lighting apparatus, and all devices for the utilization of gas, oil, and electricity and other agencies for cooking, lighting, and heating, together with all parts, fixtures, instruments, mechanisms, attachments, and machinery, incident to, or appertaining to, or to be used in connection with gas, oil, electricity, or other agencies used for the purposes of the business of this Company.

(b) To apply for, obtain, purchase, or otherwise acquire, and to reg-

ister, patent, or otherwise secure, any and all trade-marks, inventions, devices, improvements, and appliances, patented or otherwise, relating to, or applicable to, the use of gas, oil, electricity, or other agencies for cooking, heating, or lighting, or capable of being used in connection therewith; to own, hold, use, operate, manufacture under, introduce, sell, assign, or otherwise dispose of the same; and to do all other things as may be necessary or desirable to acquire, use, dispose of, and turn to account, any and all such patents, licenses, trade-marks, improvements, devices, and appliances.

(c) To carry on the trade or business of buying, selling, renting, leasing, producing, preparing, adapting, manufacturing, and otherwise dealing in any and all kinds of gas, oil, and electrical devices, fixtures, mechanisms, machines, novelties, and supplies, and hardware of all kinds and descriptions, and of all materials, raw and manufactured, useful or desirable in connection with or relating to such trade or business; and to carry on any other manufacturing or mercantile business that can be advantageously conducted in connection with the said business.

22—Hotel

(a) To plan, design, and construct buildings for hotel purposes or to buy, sell, and acquire the same; to conduct and carry on such hotel or hotels for the accommodation of the public; and to rent private rooms, suites, and all accommodation necessary for that purpose.

(b) To conduct and carry on the business of buying and selling cigars and tobacco, of providing meals and food for the general public, and to buy all things necessary in connection therewith.

(c) To purchase, lease, or otherwise acquire lands, buildings, and real estate for hotel use; and to lease, mortgage, and convey such real estate in such manner as may appear to the best interests of the corporation.

23—Ice Company

(a) To manufacture, buy, sell, store, and generally deal in and with ice and refrigerating material and supplies, and to transact all legitimate business incidental thereto or in anywise connected therewith.

(b) To carry on the business of refrigerating, cold storage, and general warehousing and all the business necessarily or impliedly incidental thereto; to manufacture, sell, and trade in all goods usually dealt in by warehousemen; to construct, hire, purchase, operate, and maintain all or any conveyances for the transportation in cold storage or otherwise by land or water of any or all products, goods, or manufactured articles; and to do all things incidental to the business of cold storage and warehousing.

24—Insurance Agents

To conduct and carry on as agents or brokers the business of marine, fire, life, accident, fidelity, employment, burglary, credit, plate-glass, steam-boiler, title, and all other kinds and classes of insurance.

25—Inventions

(a) To acquire the United States rights for the system of automatic signals devised by Henry H. Hardy of South Orange, New Jersey, together with the inventions, processes, apparatus and devices included thereunder or connected therewith; to take over such United States letters patent as may already have been issued for such inventions and improve-

ments thereon; to procure United States letters patent for such other inventions and improvements as are not already so protected; to hold all such letters patent, and to operate and manufacture thereunder, or to grant licenses in respect thereof, or to sell and assign the said patents, in whole or in part; or to dispose otherwise of and turn to account any or all of the same in such manner as may in the judgment of its Board of Directors be for the best interests of the Company.

26—Jewelry

(a) To manufacture, buy, sell, import, export, and generally deal in and with gold and silver ware, watches, jewelry, precious stones, opera glasses, chains, umbrellas, silver and plated ware, gold and silver ornaments, and all goods, wares, and merchandise usually dealt in by watch makers and jewelers.

(b) To manufacture, repair, regulate, and put in order watches, clocks, jewelry, and gold and silver ware of all kinds; and to plate, polish, and perform all operations necessary in connection with the handling of jewelers' goods, wares, and supplies.

27—Leather

(a) To manufacture, produce, and otherwise prepare, and to buy and otherwise acquire, sell, store, transport, distribute, dispose of, and deal in and with (1) leather, lumber, belting, and any and all other merchandise and commodities of whatsoever nature and character; and (2) any and all materials, machinery, appliances, products, and supplies proper or adapted to be used in or in connection with or incidental to the manufacture, production, or preparation of any of the articles, merchandise, and commodities aforesaid; and also (3) any and all commodities and things which result from or are by-products of the manufacture, production, or preparation of leather, lumber, belting, or other merchandise or articles, or in the manufacture, production, or preparation of which any of the said articles may be a factor or an ingredient, or of which the same may be a component part.

(b) To engage in any other manufacturing, warehousing, trading, or selling business of any kind or character whatsoever.

(c) To acquire, dispose of, lease, and utilize, in the manner and to the extent permitted by law, lands, timber, bark, tanneries, mills, warehouses, plants, and other buildings and structures, machinery, supplies, and any and all articles and property, including good-will, which the corporation may deem to be necessary or convenient to the attainment or furtherance of any of its objects.

(d) To hold, purchase, or otherwise acquire, or be interested in and to sell, assign, pledge, or otherwise dispose of, shares of the capital stock, bonds, or other evidences of debt issued or created by any other corporation, whether foreign or domestic and whether now or hereafter organized; and while the holder of any such shares of stock to exercise all the rights and privileges of ownership, including the right to vote thereon, to the same extent as a natural person might or could do.

28—Lighting and Heating

(a) To manufacture, buy, sell, and lease gas, oil, and electric devices, mechanisms, and apparatus, for the production of light, heat, and power, and of all such piping, conductors, and accessories as are usual in connection therewith.

(b) To manufacture, buy, sell, and deal in all kinds of goods, wares, tools, fixtures, and appliances that may be useful in the production or utilization of light, heat, and power from any source.

(c) To construct, equip, and install engines, power plants, machines, apparatus, and appliances for the manufacture, production, generation, and supplying of gas, light, heat, power, electricity, or other motive power; and to maintain, repair, improve, control, and operate the same.

29—Locks

(a) To acquire the inventions and improvements of Owen T. Hartwell relating to locks and locking devices; to manufacture under the same; and to sell and dispose of the locks and devices so manufactured.

(b) To manufacture, buy, sell, import, export, and generally deal in and with locks, fastenings, and attachments used in connection therewith.

(c) To apply for, obtain, purchase, or otherwise acquire, and to register, hold, own, and sell or otherwise dispose of, trade-marks, improvements, inventions, processes, formulæ, trade secrets, and apparatus of all kinds, whether secured under letters patent of the United States or any foreign country, or in any other manner.

30—Lumber

(a) To purchase or otherwise acquire, and to hold, lease, and sell timber, mineral, and other lands and the products thereof; to build, construct, and operate shops, sawmills, and factories for the handling of all timber and lumber and for planing, dressing, and preparing the various products of such lands for market; to buy, sell, import, export, and generally deal and trade in wood, lumber, logs, and timber and brick, stone, lime, and other building materials.

(b) To conduct and transact its said business in any of the states, territories, colonies, or dependencies of the United States, and in any and all foreign countries, to have one or more offices therein, and therein to conduct its said business.

31—Meat and Cattle

(a) To buy, sell, import, export, and deal in and with meat, live cattle, pigs, and sheep at wholesale or retail, in the United States or elsewhere, and to carry on the said trade or business of dealing in meats and meat products in all its branches; to erect and build abattoirs, cold storage warehouses, sheds, slaughter houses, packing houses, and other structures necessary or convenient for the purposes of the company.

(b) To slaughter cattle, pigs, and sheep; to preserve meat and products thereof; to buy, sell, and generally deal in hides, fats, tallow, grease, and animal products.

32—Metal Working

(a) To work and operate as welders, tool-makers, brass founders, metal workers, machinists, smiths, model-makers, and metallurgists.

(b) To design, construct, enlarge, repair, improve, and manufacture all kinds of tools, parts, motors, machines, engines, devices, mechanisms, apparatus, and inventions of all kinds.

(c) To buy, sell, lease, alter, repair, store, use, operate, manufacture, and deal in and with tools, motors, engines, machines, dynamos, appliances, and apparatus relating to or useful in connection with motor vehicles or motor machinery.

33—Mining

(a) To dig, mine, acquire, or otherwise construct or remove clay, stone, coal, ores, and other minerals, metals, and timber from any lands owned, acquired, leased, or occupied by the Company, or from any other lands in which the Company may have legal rights.

(b) To buy and sell, or otherwise deal with or to traffic in iron, steel, manganese, copper and other metals, and cement, wood, lumber, and other materials, and any products thereof, and any articles consisting or partly consisting thereof.

(c) To engage in any other manufacturing, mining, construction, or transportation business of any kind or character whatsoever, and to that end to acquire, hold, own, and dispose of any and all property, assets, stocks, bonds, and rights of any and every kind; but not to engage in any business hereunder which shall require the exercise of the right of eminent domain within the State of New Jersey.

(d) To acquire by purchase, subscription, or otherwise, and to hold or to dispose of stocks, bonds, or any other obligations of any corporation formed for, or then engaged in or pursuing, any one or more of the kinds of business, purposes, objects, or operations above indicated, or owning or holding any property of any kind herein mentioned; or of any corporation owning or holding the stock or the obligations of any such corporation.

34—Mining

(a) To buy, lease, or otherwise acquire mines, mining rights, quarries, and mineral lands of every kind, nature, and description, and to work, mine, prospect, develop, operate, and promote the same; to mine, quarry, and excavate copper, gold, silver, and other ores and metals and minerals of all descriptions.

(b) To buy, lease, construct, own, control, operate, and maintain mills, works, and plants for the crushing, sampling, milling, smelting, reduction, and concentration of minerals and metal-bearing ores, and the extraction therefrom of all kinds of metals and mineral products and by-products, on its own account and as factor and agent for others.

(c) To treat, prepare, and manufacture, and to buy, sell, and generally to deal in iron, steel, manganese, coke, copper, lumber, and other materials, and all or any articles consisting of or partly consisting of metal, wood, or other materials, and any and all products and by-products thereof.

35—Mining and Exploration

(a) To buy, lease, or otherwise acquire mines, mining rights, quarries, and mineral lands and claims of every kind, nature, and description, and to work, mine, prospect, develop, and promote the same; to mine, quarry, and excavate gold, silver, copper, and other ores and metals and minerals of all descriptions.

(b) To carry on the business of mining, milling, concentrating, converting, smelting, treating, preparing for market, reducing, buying, selling, and merchandising in gold, silver, copper, and other metals and metallic compounds, coal, coke, charcoal, and other fuels, and all products and by-products of all ores and minerals; but not to buy gold or silver bullion or foreign coins.

(c) To buy, sell, manufacture, produce, and dispose of all kinds of goods, wares, merchandise, manufactures, commodities, food stuffs, drugs,

furniture, machinery, tools, supplies, and agricultural products, and generally to engage in and carry on any forms of manufacturing or mercantile enterprise, necessary or incidental to the business of the Company.

(d) To construct bridges, buildings, machinery, ships, boats, engines, cars, and other equipment, railroads, docks, slips, elevators, water works, gas works, electric works, viaducts, aqueducts, canals, and other waterways, and any other means of transportation; and to sell the same, or otherwise dispose thereof; or to maintain and operate the same, except that the company shall not maintain or operate any railroad or canal in the State of New Jersey.

36—Mining and Manufacturing

To engage in mining of all kinds; manufacturing of all kinds; transportation of goods, merchandise, or passengers, upon land or water; building houses, structures, vessels, ships, boats, railroads, engines, cars, or other equipment, wharves, or docks; constructing, maintaining, and operating railroads (other than railroads within the State of New Jersey), steamship lines, vessel lines, or other lines for transportation; the purchase, improvement, or sale of lands.

37—Oil

(a) To buy, lease, or otherwise acquire grants, rights, powers, and privileges in connection with oil and mineral lands, and to work, bore for, prospect, develop, operate, and promote the same; to pump, prepare for market, refine, and treat all oil and mineral substances secured from the said land.

(b) To buy, sell, produce, transport, store, and export crude petroleum and all its products, and to do all things necessary for the transportation, storage, refining, and selling of the same.

(c) In other states and jurisdictions to have one or more offices, and to carry on all or any part of its operations and business, and unlimitedly and without restriction to hold, purchase, mortgage, lease, and convey real and personal property as allowed by the laws of such states and jurisdictions.

(d) For the purposes of its said business to enter into, make, perform, and carry out contracts of every sort and kind necessary or incidental to the purposes of this Company, with any person, firm, association, or corporation, whether private, public, or municipal, or with any body politic, and with the government of any country or any state, territory, or colony thereof.

38—Opticians

(a) To buy, sell, manufacture, and generally to deal in and with lenses, glasses, mirrors, and reflectors of all kinds and descriptions; and to grind, polish, mount, and prepare the same for use in optical, surgical, medical, dental, photographic, electrical, and scientific and mechanical work, and instruments of all kinds.

(b) To buy, sell, manufacture, and generally to deal in and with optical, scientific, surgical, medical, dental, and experimental tools, appliances, apparatus, instruments, reflectors, microscopes, telescopes, spy-glasses, opera glasses, magnifying glasses, spectacles, cameras, magic lanterns, stereopticons, stereoscopes, and similar wares and merchandise of all sorts and descriptions.

39—Paints and Painters' Supplies

(a) To manufacture, prepare, and sell oils, turpentine, paints, painters' supplies, and kindred articles.

(b) To buy, sell, import, export, and generally deal in and with paints, oils, turpentine, and painters' supplies of all kinds.

(c) To buy, manufacture, lease, and sell all raw materials, mills, machinery, and other articles useful or convenient in connection with the said business herein mentioned.

40—Patents

To apply for, purchase, or otherwise acquire, and to hold, own, use, operate, and to sell, assign, or otherwise to dispose of, to grant licenses in respect of or otherwise turn to account, any and all inventions, improvements, and processes used in connection with, or secured under letters patent of the United States or elsewhere, or otherwise; and, with a view to the working and development of the same, to carry on any business whether manufacturing or otherwise, which the corporation may think calculated directly or indirectly to effectuate these objects.

41—Periodical or Newspaper

(a) To take over the publication known as the Cambridge Monthly Magazine; to print, publish, and issue the same; to secure and publish news and literary material suitable for the said periodical; and to do all things necessary in connection with its publication and distribution.

(b) Generally to carry on the business of owning and publishing newspapers, magazines, and other periodicals; and in connection therewith to carry on business as printers, bookbinders, stationers, photographers, lithographers, and such other businesses or manufactures as may be convenient or necessary.

(c) To purchase, build, lease, construct, or otherwise acquire such buildings, offices, plants, and machinery as may be necessary or useful to carry out the objects and purposes of this company.

42—Photographic Apparatus

To buy, sell, manufacture, and generally deal in and with cameras, tripods, dry plates, films, photographic chemicals, sensitized papers, plate-holders, screens, slides, printing frames, and all other apparatus, devices, supplies, and materials used in the art of photography or in connection therewith.

43—Pianos and Musical Instruments

To buy, sell, import, export, and generally deal in and with pianos, organs, and other musical instruments; and in all things, fixtures, furniture, and appliances useful or convenient in connection with the said business for the use of musical instruments; to manufacture, buy, sell, import, and export any and all kinds of musical instruments, materials, and supplies for the same, musical articles, furniture, cases, or conveniences used in the production of music, or in connection with the operation of musical instruments.

44—Printing

(a) To buy, sell, manufacture, and carry on the business of printers, publishers, stationers, engravers, designers; and to engage generally in the art, trade, and business of printing, engraving, lithographing, and all other

methods of printing, or producing or reproducing printing, engraving, drawings, paintings, pictures, and representations and impressions of all kinds in color or otherwise.

(b) To print, publish, bind, and buy, sell, and deal in books, papers, magazines, periodicals, and advertising and printed matter of all kinds; to hold, use, sell, circulate, distribute, and dispose of the same; and generally to do all things incidental to or connected with the business of printing and publishing.

(c) To buy, sell, rent, manufacture, install, use, operate, and generally deal in and with machines, mechanisms, devices, apparatus, inventions, and improvements for printing, writing, duplicating, type-setting, type-making, linotyping, casting, or making type, making printing slugs, plates, platens, stereotypes, and all other things for use in or in connection with the printers' art, trade, and business.

(d) To apply for, obtain, purchase, or otherwise acquire, and to register, hold, own, use, operate, sell, assign, or otherwise dispose of and turn to account and profit, any and all trade-marks, improvements, processes, formulæ, trade secrets, inventions, and apparatus of all kinds, whether secured under letters patent of the United States or in any foreign country, or in any other manner.

(e) To apply for, obtain, purchase, or otherwise acquire, and to own, hold, use, sell, assign, or otherwise dispose of and turn to profit and account, copyrights and publishing rights of all kinds.

45—Railroad Construction

(a) To do all things necessary or useful in connection with the construction of railways, railway bridges, and railway terminals, and the doing of all things and the making of all contracts for such construction.

(b) To deal in stocks, bonds, and other securities of railroad companies, and to purchase, hold, pledge, and sell the same.

(c) To buy, sell, and deal in real estate, rights of way, and the selling or leasing of the same.

(d) To promote and organize railroad corporations, to sell their stocks and other securities, and to secure finance for their construction.

(e) To acquire franchises, concessions, rights of way, and other privileges to be utilized for railroads or railroad construction.

46—Real Estate

(a) To take, lease, purchase, or otherwise acquire, and to own, use, hold, sell, convey, exchange, lease, mortgage, work, improve, develop, cultivate, and otherwise handle, deal in, and dispose of real estate, real property, and any interest or right therein.

(b) To take, purchase, or otherwise acquire, and to own, hold, sell, convey, exchange, hire, lease, pledge, mortgage, and otherwise deal in and dispose of all kinds of personal property, chattels, chattels real, choses in action, notes, bonds, mortgages, and securities.

(c) To convert and appropriate any land that may be acquired or be lawfully controlled by this corporation, into and for ways, roads, paths, streets, alleys, sidewalks, parks, gardens, boulevards, and pleasure grounds; and generally to deal with, manage, improve, and administer the lands owned and controlled by the corporation or entrusted to its care.

(d) To erect or have erected, to construct or have constructed, houses, works, buildings, store-rooms, factories, tenements, edifices, and structures of every description; and to rebuild, enlarge, improve, and alter existing

houses, works, buildings, store-rooms, tenements, edifices, and structures of every description; and to buy, sell, own, use, manage, and lease the same or similar structures.

(e) To warrant the title to lands or to any estate or interest in lands sold by said corporation; to issue notes, bonds, and debentures secured by mortgage or deed of trust upon the property of said corporation or otherwise; and to sell and dispose of the same for the benefit of the corporation or for any lawful purpose.

(f) To make, enter into, perform and carry out, contracts for constructing, building, altering, improving, repairing, decorating, maintaining, furnishing, and fitting up buildings, tenements, and structures of every description; and to advance money to, and to enter into agreements of all kinds with builders, contractors, property owners, and others for said purposes.

(g) To collect rents and make repairs, and transact, on commission or otherwise, the general business of a real estate agent, and, generally, the sale, leasing, control, and management of lands, buildings, and property of all kinds.

47—Refrigerating Company

(a) To plan, design, lay out, construct, and contract to install plants, machinery, factories, and apparatus for mixing, making, freezing, preparing, and marketing ices, ice-creams, and all kinds of frozen and refrigerated substances.

(b) To contract and undertake the planning, designing, manufacture, and construction of ice, cold storage, and refrigerating plants, machinery, apparatus, and conveyances, and of all buildings, structures, piping, and storing facilities necessary or pertaining thereto.

(c) To carry on a general contracting and engineering business in all its branches; particularly to carry on the business of refrigerating engineering; and to design, erect, construct, enlarge, repair, improve, and manufacture all kinds of ice, cold storage, and refrigerating plants, engines, machinery, insulation, and apparatus.

(d) To carry on the business of ice-making, cold storage, refrigeration, and making ice-cream, and do all things incidental thereto; to buy, sell, construct, operate, and maintain ice plants, cold storage warehouses, refrigerating apparatus, and conveyances for the transportation in cold storage of all goods, products, and wares.

48—Scales and Weighing Machines

(a) To manufacture, buy, sell, import, export, and generally deal in and with scales, weighing machines, and mechanical devices for measuring, weighing, and recording data as to the weight and measurements of all kinds of goods, substances, commodities, and merchandise.

(b) To acquire patent rights, trade-marks, licenses, and all other rights relating to scales, weighing machines, measuring and recording devices, and tools, mechanisms, and machinery useful in connection therewith and the manufacture thereof; to manufacture, and operate under the same, and to license others to manufacture and operate under the same, and turn the same to profit in all lawful ways.

49—Schools

To establish and conduct a school or schools; to provide courses of study preparatory for business or professional life or for general culture;

to establish classical, mathematical, scientific, business, technical, and general courses of study; to conduct institutes, lectureships, training schools, courses of study, and home classes; to provide for the holding and giving of lectures, exhibitions, public meetings, and conferences adapted directly or indirectly to advance the calling of education; to secure, print, and publish books and courses of study suitable for use in connection with the schools and courses of study of this corporation.

50—Securities Company

(a) To buy, sell, hold, and generally to deal in and with stocks, bonds, debentures, mortgages, and securities of all kinds; to borrow money, make loans, advance money on contracts, make investments, and generally act as investment brokers; to issue notes, bonds, securities, and debentures which may be secured by mortgage or otherwise upon property real and personal of the corporation under the provisions of Section 2 of the Stock Corporations Law of the State of New York; and to purchase, hold, improve, sell, lease, or exchange real estate.

(b) To act as agents, factors, brokers, commission merchants, contractors, lessees, and managers of estates or otherwise in entering into, undertaking, performing, negotiating, executing, conducting, and transacting for persons, firms, and corporations upon commission or otherwise, any and all the things set forth in this certificate that it can do for itself; and to exercise all of its powers to the same extent that a natural person might do, and in any part of the world to the full extent permitted to corporations organized under the Business Corporations Law of the State of New York.

(c) To purchase, acquire, hold, and dispose of the stocks, bonds, and other evidences of indebtedness of any corporation, domestic or foreign, and issue in exchange therefor its stock, bonds, or other obligations; and to exercise while owner of the stock of other corporations all the rights, powers, and privileges of ownership, including the right to vote thereon.

(d) To guarantee or cause to be guaranteed the payment of dividends or interest on any bonds, stocks, debentures, or other securities of this corporation; and to guarantee or cause to be guaranteed the contracts and obligations of this corporation whenever proper or necessary for its business in the judgment of its Board of Directors.

51—Sugar Business

(a) To conduct and carry on the business of manufacturing, producing, importing, refining, preparing, and shipping sugar, sugar cane, syrups, and all products and by-products thereof.

(b) To purchase, lease, and construct refineries, buildings, and other structures and buildings useful in connection with the said business of refining, preparing, and dealing in sugar and sugar products.

(c) To construct, purchase, or otherwise secure steamships, steamboats, and sailing vessels, and such docks, wharves, and terminal facilities as may be convenient or necessary to the business of the company.

(d) To carry on the business of warehousing, and to do all business necessary and incidental thereto.

52—Textile Fibres

(a) To buy, sell, grow, prepare, manufacture, and generally deal in and with flax, hemp, jute, wool, silk, cotton, and fibres and fibrous materials of all kinds; to buy, sell, prepare, manufacture, and generally deal in

all products and by-products of said materials and substances, or products and by-products consisting in part of such materials and substances; to bleach, dye, print, color, and otherwise treat and manipulate, and to spin, comb, weave, and prepare for market, either wholly or in part; and to buy, sell, market, and deal in any and all such products, by-products, materials, manufactures, and substances; and to do all other things and engage in any and all kinds of business which may be necessary, ancillary, incidental, profitable, or convenient in connection with said business or any portion thereof.

(b) To buy, sell, own, hold, use, operate, and generally to deal in and with all devices, machines, mechanisms, and engines that may be useful or convenient in the treatment, preparation, manufacture, and manipulation of flax, hemp, jute, wool, silk, cotton, and other fibres and fibrous materials of all kinds.

53—Tobacco

To buy, manufacture, sell, lease, let, and hire, machines and machinery, tools, implements and appliances, and all other property, real or personal, useful or available, in the manufacture, cultivation, care, or treatment of any form of tobacco and its products and by-products; and articles and materials in any wise relating thereto or connected therewith.

54—Toilet Specialties

(a) To prepare, manufacture, and sell the facial preparation known as "Rose Créme," and generally to buy, sell, manufacture, prepare, and deal in and with fine perfumeries, toilet preparations, and all such drugs, unguents, chemicals, and other materials as may be used or handled in connection therewith.

(b) To buy, sell, combine, prepare, manufacture, and generally to deal in and with all manner of chemicals, chemical products, drugs, and pharmaceutical compounds and preparations thereof; and to patent, register, or otherwise protect the same.

CHAPTER LXIII

BY-LAW FORMS

Form 6. By-Laws—Simple Form

BY-LAWS
of the
COLLINGWOOD TOOL COMPANY
New York City

ARTICLE I—STOCK

1. *Certificates of Stock* shall be issued to each holder of full-paid stock, in numerical order, from the stock certificate book, be signed by the President and Treasurer, and sealed by the Secretary with the corporate seal. A record of each certificate issued shall be kept on the stub thereof.

2. *Transfers of Stock* shall be made only upon the books of the Company, and before a new certificate is issued the old certificate must be surrendered for cancellaton. The stock books of the Company shall be closed for transfer twenty days before general elections and ten days before dividend days.

3. *The Treasury Stock* of the Company shall consist of such issued and outstanding stock of the Company as may be donated to the Company or otherwise acquired, and shall be held subject to disposal by the Board of Directors. Such stock shall neither vote nor participate in dividends while held by the Company.

ARTICLE II—STOCKHOLDERS

1. *The Annual Meeting* of the Stockholders of this Company shall be held in the principal office of the Company, in New York City, on the second Monday in January of each year, at 12 M., if not a legal holiday; but if a legal holiday, then on the next business day following.

2. *Special Meetings* of the stockholders may be called at the principal office of the Company at any time by resolution of the Board of Directors, or upon written request of stockholders holding one-third of the outstanding stock.

3. *Notice of Meetings*, written or printed, for every regular or special meeting of the stockholders, shall be prepared and mailed to the last known post-office address of each stockholder not less than ten days before any such meeting, and if for a special meeting, such notice shall state the object or objects thereof. No failure of or irregularity of notice of any regular meeting shall invalidate such meeting or any proceeding thereat.

4. *A Quorum* at any meeting of the stockholders shall consist of a majority of the voting stock of the Company, represented in person or by

proxy. A majority of such quorum shall decide any question that may come before the meeting.

5. *The Election of Directors* shall be held at the annual meeting of stockholders, and shall, after the first election, be conducted by two inspectors of election, appointed by the President for that purpose. The election shall be by ballot, and each stockholder of record shall be entitled to cast one vote for each share of stock held by him.

6. *The Order of Business* at the annual meeting, and, as far as possible, at all other meetings of the stockholders, shall be:

1. Calling of Roll
2. Proof of Due Notice of Meeting
3. Reading and Disposal of Any Unapproved Minutes
4. Annual Reports of Officers and Committees
5. Election of Directors
6. Unfinished Business
7. New Business
8. Adjournment

ARTICLE III—DIRECTORS

1. *The Business and Property* of the Company shall be managed by a Board of seven Directors, who shall be stockholders and who shall be elected annually by ballot by the stockholders for the term of one year, and shall serve until the election and acceptance of their duly qualified successors. Any vacancies may be filled by the Board for the unexpired term. Directors shall receive no compensation for their services as such.

2. *The Regular Meetings* of the Board of Directors shall be held in the principal office of the Company in New York City on the third Tuesday of each month, at 3 P.M., if not a legal holiday; but if a legal holiday, then on the next business day following.

3. *Special Meetings* of the Board of Directors, to be held in the principal office of the Company in New York City, may be called at any time by the President, or by any three members of the Board, or may be held at any time and place without notice, by unanimous written consent of all the members, or with the presence and participation of all members at such meeting.

4. *Notices* of both regular and special meetings shall be mailed by the Secretary to each member of the Board not less than five days before any such meeting, and notices of special meetings shall state the purposes thereof. No failure or irregularity of notice of any regular meeting shall invalidate such meeting or any proceeding thereat.

5. *A Quorum* at any meeting shall consist of a majority of the entire membership of the Board. A majority of such quorum shall decide any question that may come before the meeting.

6. *Officers of the Company* shall be elected by ballot by the Board of Directors at their first meeting after the election of Directors each year. If any office becomes vacant during the year, the Board of Directors shall fill the same for the unexpired term. The Board of Directors shall fix the compensation of the officers and agents of the Company.

7. *The Order of Business* at any regular or special meeting of the Board of Directors shall be:

1. Reading and Disposal of Any Unapproved Minutes
2. Reports of Officers and Committees
3. Unfinished Business
4. New Business
5. Adjournment

Article IV—Officers

1. *The Officers of the Company* shall be a President, a Vice-President, a Secretary, and a Treasurer, who shall be elected for one year and shall hold office until their successors are elected and qualify. The position of Secretary and Treasurer may be united in one person.

2. *The President* shall preside at all meetings, shall have general supervision of the affairs of the Company, shall sign or countersign all certificates, contracts, and other instruments of the Company as authorized by the Board of Directors; shall make reports to the Directors and stockholders and perform all such other duties as are incident to his office or are properly required of him by the Board of Directors. In the absence or disability of the President, the Vice-President shall exercise all his functions.

3. *The Secretary* shall issue notices for all meetings, shall keep their minutes, shall have charge of the seal and the corporate books, shall sign, with the President, such instruments as require such signature, and shall make such reports and perform such other duties as are incident to his office, or are properly required of him by the Board of Directors.

4. *The Treasurer* shall have the custody of all moneys and securities of the Company and shall keep regular books of account and balance the same each month. He shall sign or countersign such instruments as require his signature, shall perform all duties incident to his office or that are properly required of him by the Board, and shall give bond for the faithful performance of his duties in such sum and with such sureties as may be required by the Board of Directors.

Article V—Dividends and Finance

1. *Dividends* shall be declared only from the surplus profits at such times as the Board of Directors shall direct, and no dividend shall be declared that will impair the capital of the Company.

2. *The Moneys* of the Company shall be deposited in the name of the Company in such banks or trust companies as the Board of Directors shall designate, and shall be drawn out only by check signed by the Treasurer and countersigned by the President.

Article VI—Seal

1. *The Corporate Seal* of the Company shall consist of two concentric circles between which is the name of the Company, and in the centre shall be inscribed "Incorporated 1917, New York," and such seal, as impressed on the margin hereof, is hereby adopted as the Corporate Seal of the Company.

Article VII—Amendments

1. *These By-Laws* may be amended, repealed, or altered, in whole or in part, by a majority vote of the entire outstanding stock of the Company, at any regular meeting of the stockholders, or at any special meeting where such action has been announced in the call and notice of such meeting.

2. *The Board of Directors* may adopt additional by-laws in harmony therewith, but shall not alter nor repeal any by-laws adopted by the stockholders of the Company.

Form 7. By-Laws—Extended Form

BY-LAWS

of the

HAMILTON SILK MILLS COMPANY

Incorporated under the Laws of New Jersey

ARTICLE I—STOCK

SEC. 1. *Certificates of Stock*

Each stockholder of the company whose stock has been paid for in full shall be entitled to a certificate or certificates showing the amount of stock of the Company standing on the books in his name. Each certificate shall be numbered, bear the signatures of the President and Treasurer and the seal of the Company, and be issued in numerical order from the stock certificate book. A full record of each certificate of stock, as issued, must be entered on the corresponding stub of the stock certificate book.

SEC. 2. *Transfers of Stock*

Transfers of stock shall be made upon the proper stock books of the Company, and must be accompanied by the surrender of the duly indorsed certificate or certificates representing the transferred stock. Surrendered certificates shall be cancelled and attached to the corresponding stubs in the stock certificate book and new certificates issued to the parties entitled thereto. The stock books shall be closed to transfers twenty days before general elections and twenty days before dividend days.

SEC. 3. *Lost Certificates*

The Board of Directors may order a new certificate or certificates of stock to be issued in the place of any certificate or certificates of the Company alleged to have been lost or destroyed, but in every such case the owner of the lost certificate or certificates shall first cause to be given to the Company a bond in such sum, not less than the par value of such lost or destroyed certificate or certificates of stock, as said Board may direct, as indemnity against any loss or claim that the Company may incur by reason of such issuance of stock certificates; but the Board of Directors may, in their discretion, refuse to replace any lost certificate, save upon the order of some court having jurisdiction in such matter.

SEC. 4. *Stock and Transfer Books*

The stock and transfer books of the Company shall be kept in its principal office, No. 525 Main Street, East Orange, New Jersey, and shall be open during business hours to the inspection of any stockholder of the Company. All other books and records of the Company shall be kept in its office in New York City, and shall include a stock book, which shall be open during business hours to the inspection of any stockholder or judgment creditor of the Company.

SEC. 5. *Preferred Stock*

The capital stock of this Company shall be One Hundred Thousand Dollars, consisting of One Thousand Shares, each of the par value of One

Hundred Dollars. Of these, Five Hundred Shares shall be preferred stock, and Five Hundred Shares shall be common stock.

Said preferred stock shall receive from the net earnings of the Company a six per cent annual cumulative dividend before any dividends are paid upon the common stock, but such stock shall not entitle the holders thereof to vote at the meetings of the stockholders of the Company.

SEC. 6. *Treasury Stock*

All issued and outstanding stock of the Company that may be donated to or be purchased by the Company shall be treasury stock, and shall be held subject to disposal by the action of the Board of Directors. Such stock shall neither vote nor participate in dividends while held by the Company.

ARTICLE II—STOCKHOLDERS

SEC. 1. *Annual Meetings*

The regular annual meetings of the stockholders shall be held in the office of the Company, at No. 525 Main Street, East Orange, New Jersey, at 12 M., on the second Monday of January in each year, if not a legal holiday; but if a legal holiday, then on the next business day following. At this meeting the Directors for the ensuing year shall be elected, the officers of the Company shall present their annual reports, and the Secretary shall have on file for inspection and reference an alphabetical list of the stockholders, giving the amount of stock held by each, as shown by the stock books of the Company twenty days before the date of such annual meeting.

SEC. 2. *Special Meetings*

Special meetings of the stockholders may be held at any time, in the office of the Company, pursuant to a resolution of the Board of Directors, or by a call signed by stockholders holding a majority of the voting stock of the Company. Calls for special meetings shall specify the time, place, and object or objects thereof, and no other business than that specified in the call shall be considered at any such meeting.

SEC. 3. *Notice of Meetings*

A written or printed notice of every regular or special meeting of the stockholders, stating the time and place, and, in case of special meetings, the objects thereof, shall be prepared and mailed by the Secretary, postage prepaid, to the last known post-office address of each stockholder, at least ten days before the date of any such meeting. No failure or irregularity of notice of any regular meeting shall invalidate the same or any proceeding thereat.

SEC. 4. *Voting*

Only stockholders of record shall be entitled to vote at the regular and special meetings of stockholders. At such meetings each stockholder shall be entitled to one vote for each share of stock held in his name.

SEC. 5. *Election of Directors*

At the first meeting of the stockholders a Board of seven Directors shall be elected, who shall serve until the election and acceptance of their duly qualified successors. Thereafter, at each annual meeting of the stockholders of the Company, seven Directors shall be elected, who shall serve

until the election and acceptance of their duly qualified successors. All elections for Directors shall be by ballot, and the candidates, to the number to be elected, receiving the highest number of votes, shall be declared elected.

If for any reason Directors are not elected at the regular meeting of stockholders, a special meeting shall be called for the purpose within thirty days thereafter, at which Directors shall be elected in all respects as at the annual meeting.

Two inspectors of election shall be appointed by the President to conduct the election of Directors to serve for the ensuing year. These inspectors shall be sworn to the faithful discharge of their duty and shall then take charge of the election. No person who is a candidate for the office of Director shall act as an inspector of election.

SEC. 6. *Quorum*

A majority of the outstanding stock, exclusive of treasury stock, shall be necessary to constitute a quorum at meetings of stockholders. When a quorum is present at any meeting, a majority of the stock represented thereat shall decide any question brought before such meeting. In the absence of a quorum those present may adjourn the meeting from day to day, but until a quorum is secured may transact no business.

SEC. 7. *Proxies*

Any stockholder entitled to vote may be represented at any regular or special meeting of stockholders by a duly executed proxy. Proxies shall be in writing and properly signed, but shall require no other attestation. No proxy shall be recognized unless executed within eleven months of the date of the meeting at which it is presented.

SEC. 8. *Officers of Meetings*

The President, if present, shall preside at all meetings of the stockholders. In his absence, the next officer in due order who may be present shall preside. For the purposes of these by-laws, the due order of officers shall be as follows: President, Vice-President, and Treasurer.

The Secretary of the Company shall keep a faithful record of the proceedings of all stockholders' meetings.

SEC. 9. *Order of Business*

The order of business at the annual meeting, and, so far as practicable, at all other meetings of the stockholders, shall be as follows:

1. Calling of Roll.
2. Proof of Due Notice of Meeting
3. Reading and Disposal of Any Unapproved Minutes
4. Annual Reports of Officers and Committees
5. Election of Directors
6. Unfinished Business
7. New Business
8. Adjournment

ARTICLE III—DIRECTORS

SEC. 1. *Number and Authority*

A Board of seven Directors shall be elected, who shall have entire charge of the property, interests, business, and transactions of the Company, with full power and authority to manage and conduct the same.

SEC. 2. *Qualifications*

No person shall be elected, nor shall be competent to act as a Director of this Company, unless he is at the time of election the holder of record of at least one share of its stock. At least one of the Directors of the Company must be a resident in the State of New Jersey.

SEC. 3. *Vacancies*

Any vacancy occurring in the Board of Directors may be filled for the unexpired term by a majority vote of the remaining members. In event of the membership of the Board falling below the number necessary for a quorum, a special meeting of the stockholders shall be called and such number of Directors shall be elected thereat as may be necessary to restore the membership of the Board to its full number.

SEC. 4. *Regular Meetings*

The regular meetings of the Board of Directors shall be held in the office of the Company, in the City of New York, at 3 P. M., on the second Monday of each month, if not a legal holiday; but if a legal holiday, then on the next business day following.

SEC. 5. *Special Meetings*

Special meetings of the Board of Directors may be held at any time, in the office of the Company, in the City of New York, on the written call of the President or of any three members of the Board. Special meetings may be held at any time and place and without notice, by unanimous consent of the Board.

SEC. 6. *Notice of Meetings*

The Secretary shall notify each member of the Board of all regular or special meetings, by mailing to each member's last known post-office address, postage prepaid, at least five days before any such meeting, a written or printed notice thereof, giving the time, place, and, in case of special meetings, the objects thereof, and no other business shall be considered at any such meeting than shall have been so notified to the members. No failure or irregularity of notice of any regular meeting shall invalidate the same or any proceeding thereat.

SEC. 7. *Quorum*

A majority of the Board of Directors shall constitute a quorum, and a majority of the members in attendance at any Board meeting shall, in the presence of a quorum, decide its action. A minority of the Board present at any regular or special meeting may, in the absence of a quorum, adjourn to a later date, but may not transact any business until a quorum has been secured.

SEC. 8. *Election of Officers*

At the first meeting of the Board of Directors after the election of Directors each year, a President, Vice-President, Secretary, Treasurer, and General Manager shall be elected to serve for the ensuing year and until the election of their respective successors. Election shall be by ballot, and a majority of the votes cast shall be necessary to elect. If not detrimental to the business or operations of the Company, any two offices may be conferred upon one person. The Directors shall fix the compensation of officers, subject to the limitations of the Charter and the By-Laws. Any vacancies that occur may be filled by the Board for the unexpired

term. The Board shall have the right to remove any officer for cause by a two-thirds vote of the entire membership of the Board.

SEC. 9. *Compensation of Directors*

Each Director shall receive the sum of five dollars as compensation for his attendance at any regular or special meeting of the Board of Directors, and shall receive no other salary or compensation for his services as a Director of the Company.

SEC. 10. *Power to Pass By-Laws*

The Board of Directors shall have no power to amend, alter, or repeal the by-laws, but may pass such additional by-laws in conformity therewith as may be necessary or convenient to facilitate the business of the Company.

SEC. 11. *Executive Committee*

The President, Vice-President, and Treasurer shall together constitute an Executive Committee, which shall be a part of the permanent executive organization of the Company, and shall, in the interim between meetings of the Board of Directors, exercise all the powers of that body, in accordance with the general policy of the Company and the directions of the Board.

Meetings of the Executive Committee shall be held on call of the President, or of any two members of the Committee. All of the members of the Committee must be duly notified of meetings; and a majority of the members shall constitute a quorum. The Executive Committee shall keep due record of all meetings and actions of the Committee, and such records shall at all times be open to the inspection of any Director.

SEC. 12. *Corporation Offices*

The principal office of the Company within the State of New Jersey shall be at 525 Main street, East Orange, and the agent therein and in charge thereof upon whom process may be served shall be the Registration and Trust Company. An office shall also be maintained in New York City, and such other offices for the transaction of its business shall be maintained at such other places in or outside of said State, as may be determined upon by the Board of Directors.

SEC. 13. *Order of Business*

The regular order of business at meetings of the Board of Directors shall be as follows:

1. Reading and Disposal of Any Unapproved Minutes
2. Reports of Officers and Committees
3. Unfinished Business
4. New Business
5. Adjournment

ARTICLE IV—OFFICERS

SEC. 1. *Enumeration, Election, and Qualification*

The officers of the Company shall be a President, Vice-President, Treasurer, Secretary, and General Manager. These officers shall be elected by the Board of Directors at the first regular meeting after the election of directors each year, and shall hold office for the term of one year, and until their respective successors are duly elected and qualify. The Presi-

dent and Vice-President shall be elected from among the Board of Directors.

SEC. 2. *The President*

The President, when present, shall preside at all meetings of the stockholders and of the Board of Directors; shall sign all certificates of stock; shall sign or countersign, as may be necessary, all such bills, notes, checks, contracts, and other instruments as may pertain to the ordinary course of the Company's business; and sign, when duly authorized thereto, all contracts, orders, deeds, liens, licenses, and other instruments of a special nature.

He may also, in the absence or disability of the Treasurer, indorse checks, drafts, and other negotiable instruments for deposit or collection, and shall, with the Secretary, sign the minutes of all meetings over which he may have presided.

At the first regular meeting of the Board in January he shall submit a complete report of the operations of the Company for the preceding year, together with a statement of the Company's affairs as existing at the close of such year, and shall submit a similar report at the annual meeting of stockholders; also he shall report to the Board of Directors, from time to time, all such matter coming within his notice and relating to the interests of the Company as should be brought to the attention of the Board.

He shall be, ex officio, a member of all standing committees, shall have such usual powers of supervision and management as may pertain to the office of President, and perform such other duties as may be properly required of him by the Board of Directors.

SEC. 3. *The Vice-President*

The Vice-President shall familiarize himself with the affairs of the Company, and, in the absence, disability, or refusal to act of the President, shall possess all of the powers and perform all of the duties of that officer.

SEC. 4. *The Secretary*

The Secretary shall keep full minutes of all meetings of the stockholders and of the Board of Directors; shall read such minutes at the proper subsequent meetings; shall issue all calls for meetings and notify all officers and directors of their election; shall have charge of and keep the seal of the corporation, and affix the same to certificates of stock when such certificates are signed by the President and Treasurer, and shall affix the seal, attested by his signature, to such other instruments as may require the same.

He shall keep the stock certificate book and the other usual corporation books, and shall prepare, record, transfer, issue, seal, and cancel certificates of stock, as required by the transactions of the Company and its stockholders. He shall also sign with the President all contracts, deeds, licenses, and other instruments when so ordered.

He shall make such reports to the Board of Directors as they may request, and shall also prepare such reports and statements as are required by the State laws. He shall make out, twenty days before any election of Directors, a complete list of the stockholders entitled to vote at such election, arranged in alphabetical order, and giving the number of shares of stock that may be voted by each, and shall keep the same open to inspection at the office of the Company until the time of and during the said election. He shall allow any stockholder, on application in business hours,

to inspect the stock certificate books, the stock transfer book, and the stock ledger.

He shall attend to such correspondence and to such other duties as may be incidental to his office or properly be assigned him by the Board.

He shall receive such salary, not exceeding twelve hundred dollars per annum, as may be fixed by the Board of Directors.

SEC. 5. *The Treasurer*

The Treasurer shall have the custody of and be responsible for all moneys and securities of the Company; shall keep full and accurate records and accounts in books belonging to the Company, showing the transactions of the Company, its accounts, liabilities, and financial condition; and shall see that all expenditures are duly authorized and are evidenced by proper receipts and vouchers. He shall deposit, in the name of the Company, in such depository or depositories as are approved by the Directors, all moneys that may come into his hands for the Company account. His books and accounts shall be open at all times during business hours to the inspection of any Director of the Company.

The Treasurer shall also indorse for collection or deposit all bills, notes, checks, and other negotiable instruments of the Company; shall pay out money as may be necessary in the transactions of the Company, either by special or general direction of the Board of Directors, and on checks signed by the President and himself, and shall generally, together with the President, have supervision of the finances of the Company.

He shall also make a full report of the financial condition of the Company for the annual meeting of the stockholders, and shall make such other reports and statements as may be required of him by the Board of Directors or by the laws of the State.

He shall give bond in the sum of five thousand dollars, with sureties satisfactory to the Board of Directors, for the faithful performance of his duties and for the restoration to the Company, in event of his death, resignation, or removal from office, of all books, papers, vouchers, money, and other property belonging to the Company that may have come into his custody. He shall receive such compensation, not exceeding eighteen hundred dollars per annum, as may be fixed by the Board of Directors.

SEC. 6. *The General Manager*

The General Manager shall, under the supervision of the Board of Directors and the President, have charge of and manage the active business operations of the Company. He shall perform such further duties and make such reports as may be required of him by the Board of Directors, and shall receive such salary, not exceeding twenty-four hundred dollars per annum, as may be fixed by the Board.

ARTICLE V—DIVIDENDS AND FINANCES

SEC. 1. *Dividends*

Dividends shall be declared at such times as the Board may direct, but no dividend shall be declared or paid save from surplus profits remaining after all current liabilities of the Company have been fully paid, nor shall any dividend be declared that would impair the capital of the Company.

SEC. 2. *Reserve Fund*

No dividend to exceed six per cent per annum shall be declared by the Board of Directors until there shall have been accumulated from

surplus profits a reserve fund of ten thousand dollars, such fund to be used for the extension or enlargement of the business of the Company and the betterment of its plant, or for such other purposes as may be necessary or advisable.

SEC. 3. *Debt*

No debt shall be contracted, nor liability incurred, nor contract made by or on behalf of this Company in excess of one thousand dollars unless the same be authorized or directed by the by-laws or by a duly recorded two-thirds vote of the entire Board of Directors at a regular meeting, or at a special meeting called for the purpose.

SEC. 4. *Bank Deposits*

The Treasurer shall deposit the moneys of the Company, as the same may come into his hands, in such depository or depositories as may be designated by the Board of Directors, and such deposits shall be made in the name of the Company, and moneys shall be withdrawn therefrom only by check signed by the Treasurer and countersigned by the President.

ARTICLE VI—SUNDRY PROVISIONS

SEC. 1. *Corporate Seal*

The corporate seal of the Company shall consist of two concentric circles, between which shall be the name of the Company, and in the centre shall be inscribed "Incorporated 1917, New Jersey," and such seal, as impressed on the margin hereof, is hereby adopted as the corporate seal of the Company.

SEC. 2. *Penalties*

Any officer, director, or stockholder who shall disobey or violate any of the provisions of these by-laws shall be fined in an amount not to exceed twenty dollars, such fine to be imposed by the Board of Directors, and if not paid at the time, to be deducted from any salary or dividend then due or that may thereafter become due said person.

SEC. 3. *Amendment*

These by-laws may be amended, repealed, or altered, in whole or in part, at any regular meeting of the stockholders, or at any special meeting where such action has been duly announced in the call, provided that a majority of the entire voting stock of the Company shall vote for such amendment, repeal, or alteration.

The Board of Directors shall have no power to amend, alter, or repeal the by-laws, but may pass such additional by-laws in conformity therewith as may be necessary or convenient to facilitate the business of the Company.

CHAPTER LXIV

FORMS OF SUBSCRIPTION LISTS

The general subject of subscription lists and contracts is treated very fully in Chapter III of the present volume. No general discussion is therefore attempted here.

Form 8. Subscription List—Simple Form

SUBSCRIPTION LIST

THE INTERLOCKING SWITCH COMPANY

To be Incorporated under the Laws of New York
By JOHN H. MILLS, HARVEY CHANDLER, AND THOMAS WILSON

Capital Stock.....$100,000
Shares.....$100 each

We, the undersigned, hereby severally subscribe for and agree to take at their par value the number of shares of the capital stock of the Interlocking Switch Company set opposite our respective signatures, said subscriptions to become due so soon as said Company is organized and to be then payable in cash on demand of the Treasurer of the Company.

New York City, N. Y.
March 14, 1917.

NAMES	ADDRESSES	SHARES	AMOUNTS
Harry H. Collins	235 West 23rd St., N. Y.	10	$1,000
David B. White	975 Willis Ave., N. Y.	8	800
Willard H. Ellison	Brooklyn, N. Y.	8	800

The names of the incorporators are brought into the foregoing subscription list and into the list that follows as a means of identifying more clearly the proposed corporation.

When subscriptions are solicited widely or from parties at a distance, an individual subscription blank is usually employed and is mailed with such statements and prospectuses as may be necessary. The following is a common form.

Form 9. Subscription Blank—Individual

THE ALL-RUBBER TIRE COMPANY
175 Montgomery St.
Jersey City, N. J.

To be Incorporated under the Laws of New Jersey
for the Manufacture of Automobile Tires
By Frank Alston, John Stone, and Howard Cole

Capital Stock.....$500,000
Shares.....$10 each

I hereby subscribe for.....shares of the capital stock of the All-Rubber Tire Company at the par value thereof, and agree to pay twenty-five per cent of such subscription on demand of the Treasurer as soon as said Company is incorporated, and twenty-five per cent on demand of the Treasurer of the Company at any time after ninety days from the incorporation of said Company; the remainder of said subscription to be paid at such times and in such amounts, not exceeding ten per cent of said subscription in any one month, as may be required by the Board of Directors of said Company.

Dated at.....
.....

The right is reserved to reject or prorate any or all subscriptions.

The reservation of the right to reject or prorate subscriptions enables the parties in control to exclude undesirable subscribers and also to scale or reject applications in case of over-subscriptions.

Stockholders of financial institutions in New York are liable for debts of the company to an amount equal to the par value of the stock of the institution owned by them. This double liability is usually provided for at the time of organiza-

tion by placing the price of the stock at 200, as in the following application. This, when paid, creates a surplus equal in amount to the capital stock of the institution and, the stockholders having already paid in twice the par value of their stock, are relieved of any further liability thereon.

Form 10. Subscription to Bank Stock—Individual

SUBSCRIPTION FOR STOCK

THE SECURITY NATIONAL BANK

No. 57 Broadway, New York

Capital, $1,000,000 Surplus, $1,000,000

New York, ...1917

The undersigned applies for.....shares of the Capital Stock of The Security National Bank of New York, at Two Hundred Dollars ($200) per share and agrees to accept such portion as may be allotted and pay for same when called.

Place .....No. of Shares.....

Date .....Name .....

Address.....

The foregoing application was sent out accompanied by a list of the proposed directors of the company and by the following letter.

Form 11. Letter Accompanying Blank

THE SECURITY NATIONAL BANK

OF NEW YORK

No. 57 Broadway

Capital, $1,000,000 Surplus, $1,000,000

New York, October 26, 1917.

MR. JOHN EDWARDS,

New York, N. Y.

DEAR SIR:—

It is proposed to organize a National Bank with One Million Dollars ($1,000,000) Capital, divided into Ten Thousand (10,000) Shares at One Hundred Dollars ($100) per Share, and a Surplus of a like amount.

Offices of the Bank will be located at No. 57 Broadway, New York City. Upwards of One Million, Five Hundred Thousand Dollars ($1,500,000) have already been subscribed towards the proposed Organization and the gentlemen named on the opposite page will act as Directors.

A form of Subscription is herewith enclosed and you are invited to become a Subscriber to the Capital Stock.

Subscribers are requested to forward their subscriptions to the undersigned at the above address.

Truly yours,

WILLIS S. PARKER,

Chairman of Organization Committee.

N. B.—Subscription books will close on November eleventh.

Subscriptions made under the foregoing list or application are of the nature of a continuing proposition, and, until the company is organized and has actually accepted them, are revocable at the will of the subscribers. (See § 26.) To avoid this element of uncertainty, subscription lists are sometimes drawn as in the following form, with a trustee acting for the corporation.

Form 12. Subscription List—Trustee's

SUBSCRIPTION LIST

WINONA CEMENT COMPANY

215 Broad St., Newark, N. J.

To be Incorporated under the Laws of the State of New Jersey for the Manufacture of Portland Cement

Capital Stock.....$1,000,000
Shares.....$100 each

We, the undersigned, hereby agree with James J. McLaren as Trustee for the Winona Cement Company, to subscribe, and do hereby severally subscribe, for the number of shares of the capital stock of said Company set opposite our respective signatures, and agree to pay the par value thereof as follows:

Ten per cent on demand to James J. McLaren as Trustee for said Company, such payment, or so much thereof as may be necessary, to be

used for the preliminary and incorporating expenses of said Company; thirty per cent to the Treasurer of the Company so soon as said corporation is organized; twenty-five per cent on demand of the Treasurer of the Company at any time after ninety days from the date of incorporation, and the remainder at such times and in such instalments as may be prescribed by the Board of Directors.

Newark, New Jersey,
November, 15, 1917.

NAMES	ADDRESSES	SHARES	AMOUNTS
Mr. Alfred H. Braum	Paterson, N. J.	50	$5,000
James H. Allen	25 Wall St., N. Y.	75	7,500
William Raymond	Brooklyn, N. Y.	50	5,000

Subcriptions under this form are held to be a contract between the subscribers and the trustee. They cannot therefore be withdrawn nor revoked but are binding from the date when made. The subscription list which follows is of a similar nature.

Form 13. Subscription List—Agreement with Promoters

SUBSCRIPTION LIST

HARRISON COTTON MILLS

Capital Stock.....$500,000
Shares.....$100 each

We, the undersigned, hereby agree with William H. Hamilton and John B. Rawley, both of New York City, New York, as Promoters and Trustees of the Harrison Cotton Mills, a corporation to be organized under the laws of the State of North Carolina for the purposes and under the conditions set forth in the attached statement, to subscribe, and do hereby severally subscribe for the number of shares of the Treasury Stock of said Company set opposite our respective signatures at the rate of Seventy-five Dollars ($75) for each One Hundred Dollar share, and agree to pay the amounts of our respective subscriptions to the Treasurer of the Harrison Cotton Mills as soon as the said Company is incorporated and its Treasury Stock ready for issue; said stock to be delivered to the respective subscribers therefor full-paid and non-assessable upon payment of the said subscription price.

It is mutually agreed between the subscribers hereto and the said William H. Hamilton and John B. Rawley, Promoters and Trustees of said proposed corporation, that the subscriptions of this present contract

are conditioned upon *bona fide* subscriptions for stock to the par value of Three Hundred Thousand Dollars being secured hereunder within ninety days from the date hereof, and otherwise are null and void.

New York City, New York,
December 18, 1917.

NAMES	ADDRESSES	SHARES	AMOUNTS
Samuel H. French	Raleigh, N. C.	50	$3,750
Charles H. Wellbourne	Raleigh, N. C.	50	3,750
H. G. Williamson	New York City, N. Y.	100	7,500

Such a subscription list is usually circulated with a statement attached giving full details as to the capitalization and purposes of the company. When signed it forms an irrevocable contract between the subscribers and the trustees.

This subscription contract requires the delivery of full-paid treasury stock, notwithstanding the fact that the subscription price amounts to but 75 per cent of its face value. This is usually accomplished by the issuance of the stock for property and the return of a portion of this issued stock to the company to be sold for operating capital. Full-paid treasury stock is thus secured which can then be delivered in accordance with the requirements of the contract. (See § 81.)

CHAPTER LXV

RECEIPTS FOR STOCK SUBSCRIPTIONS

After incorporation, payments of stock subscriptions are made to the treasurer of the company and receipts are issued by him. If payments are to be made before incorporation, a trustee or trustees must necessarily be appointed to act for the company. Such trustees are usually selected by those having charge of the subscription and are named in and made parties to the subscription list.

Form 14. Trustee's Receipt

No. 1 — 15 Shares

LANSFORD MANUFACTURING CORPORATION

TRUSTEE'S CERTIFICATE

$150.00

I hereby certify that Henry M. McGill, a subscriber for Fifteen Shares of the Capital Stock of the Lansford Manufacturing Corporation at its par value of One Hundred Dollars per share, has paid to me as Trustee for said Corporation, on account of said subscription and in accordance with its terms, the sum of One Hundred and Fifty Dollars.

This receipt will, upon the organization of the said Lansford Manufacturing Corporation, be received and credited by the Treasurer thereof to its full amount as a payment upon said subscription.

New York,
November 15, 1917

GERALD H. MCNELL,
Trustee

This receipt is usually printed and bound in book form with stub attached, perforations separating the two so that the receipt may be easily torn out and given to the party making the payment. The stub is the trustee's record of the transaction. It should show the number of the receipt, the amount paid in, the name of the payee, the number of shares sub-

scribed for, the percentage or other details of the instalment, and the date.

When instalments are paid after incorporation, a simple form of treasurer's receipt may be given for each payment.

Form 15. Treasurer's Receipt for Instalment

TREASURER'S RECEIPT

No. 5 $150 5 Shares

THE WILCOX RADIATOR COMPANY
30 Broad Street
New York

Received of Edward H. Williamson the sum of One Hundred Dollars, instalment payment No. 5, of Ten Per Cent upon his subscription for Five Shares of the Capital Stock of The Wilcox Radiator Company.

New York City, October 14, 1917.

J. H. WILCOX, *Treasurer*

This receipt should also have its stub upon which the important items are entered.

When payment is made in full of a stock subscription, and the stock certificates are ready for delivery, they are in themselves a sufficient receipt. If not ready for delivery, temporary certificates are frequently issued and are exchanged for the permanent certificates of the company as soon as the latter are ready for delivery. These temporary certificates are in the form of the regular stock certificate, but are usually hastily prepared at no greater expense than is justified by their temporary nature. In some cases, however, the temporary certificate is a handsomely engraved instrument fully equal in appearance to the usual permanent certificate.

When permanent stock certificates are not ready for delivery at the time payments are made, and temporary certificates are not issued, the treasurer's receipt must bridge over the interim. This is usually more formal than the ordinary receipt.

At times when payment of stock subscriptions has bee made and neither permanent nor temporary certificates ar ready for delivery, the president will join with the treasure in the signature of the treasurer's receipt shown in Form 16 which then becomes in effect a stock scrip. The usual form o stock scrip is, however, as shown in Form 17. This scri might or might not be sealed. Ordinarily the corporate sea is affixed and the stock scrip then becomes practically a tem porary certificate.

Stock scrip is sometimes employed when subscriptio payments are made in instalments. The face of the scrip evi dences the first instalment, and subsequent instalments ar either indorsed on the back of the scrip or, if personal pay ment is impossible, are evidenced by separate receipts.

Where the conditions are such as to make payment in per son of the further instalments possible or desirable, the stoc scrip is ruled on the back to permit of the indorsement of thes payments as they are made, the treasurer's signature verifyin each payment.

The treasurer's receipt which follows is usually intende for very temporary use and is then severely plain in style.

Form 16. Treasurer's Receipt for Stock Subscription

TREASURER'S RECEIPT

No. 50 $1,000 10 Share

HOWARD PUBLISHING COMPANY
No. 225 Atlantic Avenue,
Brooklyn, N. Y.

This is to certify that Harry H. Wilson has paid into th Treasury of the Howard Publishing Company the sum of On Thousand Dollars, payment in full of his subscription for Te Shares of its Capital Stock, duly executed Certificates for whic will, upon surrender of this Receipt, be issued to his order so soo as said Certificates are ready for delivery.

August 14, 1917 FRANK J. ARDWALD,
Treasurer

Form 17. Stock Scrip

No. 1
Shares, 15.
Payment: $850.
Name,
Henry H. McGill.
Date,
Dec. 14, 1917.

No. 1 $850 15 Shares

INSTALMENT CERTIFICATE

LANSFORD MANUFACTURING CORPORATION
156 Liberty Street
New York

THIS IS TO CERTIFY, that Henry H. McGill, a subscriber for Fifteen Shares of the Capital Stock of the Lansford Manufacturing Corporation of New York City, at its par value of One Hundred Dollars per share, has this day paid into the Treasury of the Company on account of said subscription and in accordance with its terms, the sum of Eight Hundred and Fifty Dollars.

Upon payment of the remaining instalments of said subscription in accordance with the terms thereof, and surrender of this Certificate, duly executed Certificates for said Fifteen Shares of stock will be issued to the order of the said subscriber.

Witness our official signatures this 14th day of December, 1917.

WILLAIM H. HANSFORD, *Treasurer*

HARRISON H. GORDON, *President*

Form 18. Indorsement Form for Stock Scrip

Date	Number of Instalment	Amount Paid	Signature of Treasurer
April 2, 1917.....	2	$500.00	William H. Hansford
May 2, 1917.....	3	150.00	William H. Hansford

When this plan is followed, the stub should also have rulings to permit the entry of payments and their date, so that both the scrip and its stub will show a complete record of the transaction.

A subscription to stock and payments thereon are assignable. A general form of assignment to be indorsed upon the back of a receipt for subscription payments, is as follows:

Form 19. Assignment of Subscription and Payments

For Value Received, I hereby sell, assign and transfer unto John H Wardwell of New York City my subscription to Fifteen Shares of the Capital Stock of the Lansford Manufacturing Corporation, together with the payments made thereon, all as evidenced by the within certificate and I do hereby authorize and instruct the proper officials of said Company upon completion of the conditions of my said subscription, to issue said stock to the order of my said assignee.

New York, HENRY H. McGILL
December 4, 1917.

In the presence of
SAMUEL H. KENNARD

CHAPTER LXVI

STOCK CERTIFICATES AND STOCK BOOKS

Stock Certificates

The regular forms for stock certificates are usually prepared in quantity. The body and general design of the certificate are lithographed, blanks being left for the variable data such as the name of corporation, capital stock, etc., etc. These are filled in by local printers at the time the certificates are to be used. For this reason any variation of the ordinary form involves the preparation of a special certificate at a considerably increased cost. As the wording of the regular forms is fairly good, the cost of a special certificate merely to secure better wording is but seldom justified.

The certificates which follow are correct as to wording. Two forms of stub are given. The one presented in connection with Form 21, "Preferred Stock," is the clearer and better, but the stub given in connection with Form 20, "Common Stock," is so frequently supplied with the regular stock certificates that it is also presented.

From the legal standpoint the style of a stock certificate does not bear in any way upon its effectiveness. From the business standpoint, however, the certificate should at least be neat and attractive. Whether the highly-colored and embellished stock certificates so frequently seen are desirable, will depend upon the conditions.

When the item of cost is not important or when the stock exchange requirements are to be complied with, the finest bond paper is employed for stock certificates and the design and wording is engraved on steel. The cost then runs up into

the hundreds of dollars according to the style and number of certificates. On the other hand, if the issue is but temporary or the incorporators indifferent, the certificates are frequently printed or even written on ordinary paper and in plainest design. Usually, however, a good quality of bond paper is employed with the body and design lithographed and the variable data printed in, the cost ranging from $3 to $5 per hundred for the cheaper forms, up to six or eight times this amount for the better grades. A very neat, attractive certificate on good bond paper with the variable data printed and the certificates numbered and bound, will cost from $5 to $10 for a book of 100 certificates.

The name of the company is usually printed in full upon the certificates, though the abbreviation "Co." may be employed if desired. A seal is not essential to the validity of the certificate unless so provided by charter, by-law, or some other competent authority. In practice, however, it is invariably affixed.

In the absence of statutory regulation, any form of seal desired by the corporate authorities may be adopted and thereby become the corporate seal. The usual and preferable form consists of an outer and inner circle, between which appears the name of the corporation. Within appears the year of incorporation and the name of the state in which the company is incorporated. Seals for corporate purposes are made in a variety of styles, ranging in cost from $1.50 up. A good, ordinary seal should be secured for from $2 to $3.

When certificates for preferred stock are prepared, the conditions of issue should be set out in full on the face of the certificate, though, if lengthy, the certificate may merely embody the more important provisions, and reference be made on the certificate to the charter, the by-law, or the resolution under which the stock is issued.

In any such case the wording of Form 21 would be fol-

lowed to the end of the first paragraph. The next paragraph would then read as follows:

"The preferred stock represented by this certificate is authorized by the Certificate of Incorporation of the said Company as filed in the office of the Secretary of State of New York on the first day of March, 1917, and is issued under the terms and conditions therein set forth."

In some few states the statutes prescribe that the conditions of preferred stock must appear with greater or less fulness on the face of the certificate.

Preferred stock is sometimes issued in very crude form, "Preferred Stock" being printed across the face of the ordinary certificate in red or some other distinctive style, followed by the conditions under which the preferred stock is issued.

Preferred stock certificates are numbered independently of the common stock certificates. That is, the first certificate of preferred stock is numbered "1" regardless of the fact that the first certificate of common stock is also numbered "1" the two series being sufficiently distinguished by the fact that they are respectively common and preferred stock.

Sometimes stock is held by trustees under the terms of a voting trust agreement. (See Form 27.) When the trust is formed the certificates of stock to be held under it are duly assigned and are turned in to the trustees, who surrender them for cancellation and take out certificates in their own names as voting trustees.

Voting trustees' certificates are then usually prepared in the general style of the ordinary stock certificate and are delivered to the parties to whom the stock belongs to evidence its real ownership. These trustees' certificates pass by assignment, the equitable ownership of the stock being thereby vested in the assignee. Form 28 gives the general wording of a voting trustees' certificate.

Form 20. Stock Certificate—Common

Certificate No. 25

For 20 shares.
Issued to
Roger P. Sherman,
235 Greenwood Ave.,
Newark, N. J.

Dated December 10, 1917.
From whom Transferred,

Original Issue.

Dated Dec. 10, 1917.

No. Original Certificates	No. Original Shares	No. of Shares Transferred

Received Certificate No. 25 for Twenty Shares this 12th day of Dec., 1917.

ROGER P. SHERMAN

No. 25

20 Shares

Incorporated under the Laws of
The State of New Jersey

THE IMPERIAL GAS STOVE COMPANY

Capital Stock.....$150,000
Common Stock.....$100,000
Preferred Stock..... $50,000

Full-paid and Non-assessable

THIS IS TO CERTIFY that Roger P. Sherman is the owner of Twenty Shares of the Capital Stock of The Imperial Gas Stove Company, transferable only on the books of the Company by the said owner thereof in person or by duly authorized attorney, upon surrender of this Certificate properly indorsed.

{ CORPORATE SEAL } Witness the seal of the company and the signatures of its duly authorized officers this tenth day of December, 1917.

W. S. PHILLIPS,
Treasurer

GEORGE P. GOFF,
President

Shares, $100 each

Certificate No. 15.

For 10 Shares.

Dated December 4, 1917.

Issued to

Warren Calvert,
20 Broad St.,
New York City

Issued against surrendered Certificate No. (original issue).

Received the above certificate this 4th day of December, 1917.

WARREN CALVERT

This Certificate No. 15, cancelled 19

Certificates issued in its stead as follows:

No..... for.....Share

No..... " ..... "

No..... " ..... "

No. 15 — 10 Shares

Incorporated under the Laws of
The State of New Jersey

THE IMPERIAL GAS STOVE COMPANY

Capital Stock.....$150,000
Common Stock.....$100,000
Preferred Stock..... $50,000

Full-paid and Non-assessable

THIS IS TO CERTIFY that Warren Calvert is the owner of Ten Shares of the Preferred Stock of The Imperial Gas Stove Company, transferable only on the books of the Company by the said owner, in person or by duly authorized attorney, upon surrender of this Certificate properly indorsed.

The preferred stock represented by this certificate is entitled to an annual dividend of Six Per Cent (6%) payable out of the net profits of the Company before any dividend is paid upon the common stock. Should the net profits in any year be insufficient to pay said preferred dividend, either in whole or in part, any unpaid portion thereof shall become a charge against the net profits of the Company, and shall be paid out in full of said net profits before any dividends are paid upon the common stock.

Said preferred stock is subject to redemption at the option of the Company at any time after Ten (10) Years from the first day of April, 1918, upon payment of One Hundred and Five Dollars ($105) per share and any accumulated dividends.

Said preferred stock is not entitled to vote at stockholders' meetings of the Company, nor to participate in profits beyond its fixed, preferential, cumulative, annual dividend of Six Per Cent.

{ CORPORATE SEAL } Witness the Seal of the Company and the signatures of its duly authorized officers this fourth day of December, 1917.

W. S. PHILLIPS, *Treasurer*

GEORGE P. GOFF, *President*

Shares, $100 each

Stock is transferred by a similar assignment, the form being placed upon the back of the certificate. There is but one form of this assignment in common use, which, though rather informal and incomplete in some respects, is almost invariably employed. When this assignment is duly executed by the owner of record, and the certificate is duly delivered, the stock represented thereby becomes the property of the party named in the assignment form. If this party wishes to assign the certificate again, he might execute another similar assignment, either written on the back of the certificate, or prepared as a separate document and attached to the certificate, but, as is usually done, would probably surrender the certificate and take out a new one in his own name, or in the name of the party to whom he wishes the stock to be transferred.

Or the assignment might be duly executed, but the blanks not be filled in at all. The certificate is then said to be assigned in blank and may be passed from hand to hand without further formality, the ownership of the stock following the certificate. Any owner who wishes to make himself a stockholder of record, i. e., appear upon the stock books of the company as the owner of the stock, may then fill out the blanks in the assignment, turn the certificate in to the secretary of the company for cancellation, and receive a new certificate in his own name.

The following assignment is complete, the parts which have been filled in being indicated by parentheses:

Form 22. Assignment of Stock Certificate

For Value Received, (I) hereby sell and transfer unto (John J. McMillan of New York City, Twenty-five) Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint (Harry S. Gunnison) my attorney to transfer the said stock on the books of the within named Company with full power of substitution in the premises.

Dated (March 2, 1917) (Howard S. Allen)

In presence of

(Anna H. McClelland)

Usually the secretary of the company is named as the attorney who is to make the transfer on the books of the company, though any other suitable person might be named instead.

Stock Books

The usual stock books are the transfer book and the stock ledger, this latter being also frequently referred to as the stock book. (See §§ 251, 252.)

Form 23. Stock Transfer Book

Ledger Folio 27 Transfer No. 556

ALLIANCE AUTOMOBILE COMPANY

For value Received, I hereby sell, assign and transfer unto John H. Lansing, of Newark, New Jersey, Seventy-six Shares of the Capital Stock of the above-mentioned Company, now standing in my name on the Company books and represented by surrendered Certificates Nos. 32, 37, and 44.

Witness my hand and seal this 28th day of September, 1907.

GEORGE B. GOLDMAN [L. S.]
By GEORGE GALE, *Attorney,*

New Certificate No. 224
Issued to John H. Lansing
Ledger Folio 84

The transfer book is practically a duplication of the assignment appearing upon the stock certificates, and by many corporations is not kept at all, the duly executed assignment on the back of the certificate being regarded as all-sufficient authorization for the transfer of the assigned stock.

The transfer books supplied by stationers usually have a stub attached to the transfer. As the transfer itself remains in the book, this stub is merely an unnecessary repetition of matter already shown on the transfer.

The signature to the assignment of the stock transfer book

is sometimes witnessed. This signature is, however, usually that of the secretary or the transfer agent, or is affixed in their presence, and, as the assignment is at the most but supplementary to the duly witnessed assignment on the back of the surrendered certificate, a witness to its signature is generally regarded as superfluous.

In many states of the Union a stock book or stock ledger —the two being practically synonymous—is required by the state statutes. Whether required by the statutes or not, some book of the kind must necessarily be kept in order to provide an accurate record of the issued and outstanding stock of the company. The form of stock book or stock ledger shown in Form 24 will be found convenient and will meet the requirements of the statutes of almost every state of the Union.

The leaves of this book are indexed, usually as a matter of convenience, but in the State of New York to secure the alphabetical arrangement required by statute. The name and address of the stockholder with whom the particular account is kept appears at the head of the page as in an ordinary ledger. On the right-hand side of the page the party is credited with the stock he purchases or otherwise acquires, and on the left-hand side is debited with any stock disposed of. The difference between the two sides shows at any time the amount of stock standing to his credit.

On the debit or sale side of the account, the first column gives the date of the transaction; the second the name of the party to whom the stock is transferred; the third the number of the surrendered certificate; the fourth the number of the certificate reissued to the transferrer when but a portion of the stock represented by the surrendered certificate is sold, and the fifth column shows the number of shares sold.

On the credit side, which shows stock acquired by the party with whom the account is kept, the first column gives the date of purchase; the second the name of the party as-

Form 24. Stock Book or Stock Ledger

JOHN H. KIRCHER, 230 Broadway, New York

Date of Transfer	To Whom Shares are Transferred	Certificate Numbers		Number of Shares	Date of Transfer	From Whom Shares were Transferred	Amount Paid on Shares	Certificate Numbers	Number of Shares
		Surrendered	Reissued						
1916					1916				
March 13	W. K. Howard	15	70	10	January 10	Original Issue	Full Paid	15	90
July 19	Robert Moyer	70	145	40	March 25	George Holmes	"	85	75
July 31	Harold McKain	145	...	40	August 1	Harvey Cornell	"	150	35
December 3	James McNeil	85	175	20	August 15	Howard Gaines	"	160	50
December 16	James Archer	{175 / 165}	231	105	September 2	John Woodwell	"	165	100
December 31	Balance	...	...	180	October 5	Henry Simpson	"	42	45
				395					395
					1917				
					January 3..	.....	.....	.....	180

Form 25. Stock Book to be Kept by Brokers (New York Form Prescribed by Comptroller).

(Name of Firm or Individual Using This Record)

No. of Bill or Memo. of Sale	Date	Name of Stock	Number of Shares	Face Value	Name of Purchaser or Transferee	Number and Face Value of Stamps									
						2c	4c	10c	20c	50c	$1	$2	$10	$20	Value

Form 26. Stock Book to be Kept by Corporations and Transfer Agents (New York Form Prescribed by Comptroller)

HILL RIVER COPPER COMPANY

Date	Serial Number of Cancelled Certificate	Number of Shares	By Whom Surrendered	To Whom Issued	Serial Number of New Certificate	Number of Shares

signing the purchased stock; the third shows what amount has been paid on the stock, thereby indicating whether it is full paid or otherwise; the fourth column gives the numbers of the certificates issued to the party; and the last column the number of shares acquired.

Where a number of certificates are issued or cancelled in a single transaction, the entry will vary according to the conditions. If but a few certificate numbers are involved, they may usually be entered in small figures on the line in the proper column. If the numbers of certificates are too great to be so entered, two or more lines may be devoted to the transaction, or the numbers may be noted at the bottom of the page, reference to these numbers being inserted in the column where the numbers ordinarily appear. If, however, the certificates cancelled or issued are in different names, one line must necessarily be given for each certificate.

In New York, acting under authority of § 276 of the Stock Transfer Tax Law (as amended by Laws 1913, Ch. 779), a special form of stock book has been prescribed by the State Comptroller. The use of this form by New York corporations is obligatory. Form 25 shows a stock book for the use of brokers; Form 26 a stock book for the use of corporations and transfer agents. The only new feature in these prescribed forms is the introduction of the special columns for the record of the stamp tax paid on transfers in the broker's stock book. In Massachusetts, Pennsylvania, and Maine the Stock Transfer Law prescribes similar forms.

CHAPTER LXVII

VOTING TRUST FORMS

Form 27. Voting Trust Agreement

VOTING TRUST AGREEMENT

We, the Undersigned, stockholders of the Glen Harbor Improvement Company, a corporation duly organized under the laws of the State of New York, and having its principal office in the City of Yonkers, in the State of New York, do hereby, in consideration of the premises and of our mutual undertakings as herein set forth, severally agree to transfer and deliver the shares of stock held by each of us in said corporation, to Emmett M. Brown, William Swift, and Andrew McBride, all of the said City of Yonkers, as Voting Trustees hereunder, and mutually agree with them and with each other that said Trustees shall hold and vote the said stock for the period of five years from the date hereof, for the purposes and under the following terms and conditions:

1. All stockholders of the said Company may join in the voting trust hereby created, by signing this present agreement and transferring, in whole or in part, the shares of stock held by them in said Company to the said Trustees, under the conditions and for the purposes of this present agreement.

2. Each stockholder in said Company joining this voting trust as aforeprovided shall become a party thereto from the date on which stock owned by such stockholder in said Company shall be transferred and delivered to said Trustees for the purposes of this agreement.

3. The said Trustees shall surrender to the proper officer of the said Glen Harbor Improvement Company, for cancellation, the certificates for all shares of stock transferred to said Trustees, and shall, in place thereof, have certificates of said Company issued to themselves as Trustees, and on the face of each said Trustees' certificate shall be stated the fact that such certificate has been issued pursuant to this agreement.

4. The said Trustees shall collect and receive all dividends and profits accruing to said stock and shall pay over the same to the respective equitable owners thereof.

5. The said Trustees shall issue to each stockholder becoming a party thereto one or more transferable Trustees' receipts for the number of shares of stock placed by each of said stockholders respectively in this voting trust, and when such Trustees' receipts are duly transferred to other parties, said Trustees shall recognize such other parties as the lawful assigns and successors of the original parties hereto, entitled to all of their rights in the premises.

6. The stock held under this agreement shall, except as hereinafter

specially provided, be voted at any meeting of the stockholders of said Company by such of the said Trustees as may be present thereat, and said vote shall be cast as in the judgment of a majority of the said Trustees present at any such meetings may be for the best interest of the stockholders subscribing to this agreement.

7. In all elections of Directors the said stock shall be voted for the re-election of the present members of the Board of Directors of said Company, or, in the event of death, disability, or refusal to serve of any such members, the said stock shall be voted for such other person or persons as, in the judgment of said Trustees, shall be the most suitable for such office.

8. This agreement shall terminate five years from the date hereof, and upon such termination the said Trustees shall, as the outstanding Trustees' receipts are surrendered to them, duly indorsed, give over to the said Company the certificates of stock held by said Trustees, in pursuance of this agreement, properly indorsed, and shall direct the officers of said Company to deliver to the respective owners of the said surrendered Trustees' receipts certificates for such numbers of shares of stock as may be necessary to satisfy the requirements of the said surrendered Trustees' receipts.

9. In the event of the death, disability, resignation, or refusal to act of any of the Trustees herein named, the remaining Trustees, or Trustee, shall have power to suitably fill such vacancy or vacancies, and the person or persons so appointed shall be empowered and authorized to act hereunder in all respects as if originally named herein.

10. A duplicate of this agreement shall be filed in the principal office of the said Company in Yonkers and shall there be kept for the inspection of any stockholder of the Company, daily, during business hours.

In Testimony Whereof, the parties to this agreement have hereunto affixed their hands and seals in the said City of Yonkers this 27th day of February, 1917.

VOTING TRUSTEES		STOCKHOLDERS		SHARES TRANSFERRED
Emmett M. Brown	[L. S.]	James Halsey	[L. S.]	50
William Swift	[L. S.]	Ernest Jurgens	[L. S.]	125
Andrew McBride	[L. S.]	Harold M. Gilsey	[L. S.]	75
		Willis M. Ames	[L. S.]	75

Form 28. Voting Trustees' Certificate

Organized under the Laws of the State of New York

Number .... Shares

ALBANY PAPER COMPANY

Capital Stock, $750,000

Certificate for Stock Deposited
Under Voting Trust Agreement of April 12, 1912

Henry M. Turner, Frank D. McCall, William H. Montgomery, Howard T. Bergman, and Philip T. Atwater, Trustees, by the National Trust

Company, their agent, having received on deposit the entire capital stock of the Albany Paper Company, full-paid and non-assessable, all being held under the above-named agreements, to the terms of which the holder hereof assents by receiving this certificate, Certify that John N. Allen is entitled, subject to the provisions of said Agreement, to Thirty-five shares of the stock deposited thereunder. This Certificate entitles the holder to all rights, dividends, and privileges belonging to the actual stock, excepting only the right to vote. The Trusteeship herein agreed to may be terminated after three years upon the terms set forth in the above-named agreement and is ended by limitation in ten years from date of agreement.

Transferable only on the books of the undersigned at the office of the National Trust Company, New York City, by the holder hereof in person or by duly authorized attorney, upon surrender of this certificate properly indorsed.

Dated, August 15, 1917.

HENRY W. TURNER
FRANK D. MCCALL,
WILLIAM H. MONTGOMERY,
HOWARD F. BERGMAN,
PHILIP T. ATWATER,
Trustees
By NATIONAL TRUST COMPANY,
Depositary and Agent
By HOWARD T. LATHAM,
Secretary

The form of assignment on the back of this certificate would be as follows:

Form 29. Assignment of Voting Trustees' Certificate

For Value Received, I hereby sell, assign, and transfer to Charles Campbell the interest in the stock of the Albany Paper Company represented by the within certificate, and do hereby irrevocably constitute and appoint Howard T. Latham my attorney to transfer the said interest on the books of the within named Trustees with full powers of substitution in the premises.

Dated November 15, 1917. JOHN N. ALLEN

CHAPTER LXVIII

FORMS FOR FIRST MEETINGS

The general subject of the first or organization meetings of corporations is discussed at length in Chapters XXXIII and XXXIV of the present volume. The forms of the present chapter are supplementary thereto.

In most states of the Union the first directors of a corporation are elected by the stockholders, and when a corporation is organized a stockholder's meeting must of necessity precede the directors' meeting. In some states, however, as in New York, Colorado, and California, the first directors are appointed by the charter, and in such states the first meeting of stockholders loses much of its importance, particularly when the directors have power to adopt by-laws. In such case it may or may not precede the first meeting of directors at the discretion of the incorporators.

Usually at the first meeting of stockholders, the charter is to be received, by-laws adopted, directors to be elected, other details of organization to be provided for, and, as almost invariably property of some kind is to be taken over or purchased by the new corporation, the stockholders pass a resolution authorizing the directors to accept the proposition as submitted.

At the first meeting of directors, which usually immediately follows the first meeting of stockholders, officers are to be elected, and various details connected with the commencement of the corporate business are to be attended to, including the taking over or purchase of property to be acquired by the new corporation.

The procedure at the first corporate meetings varies a cording to the requirements of the particular state. In th great majority of states the first meeting of stockholders mus be held within the state. If all or a majority of the incor porators reside outside the state of incorporation—a conditio which frequently arises—the requirement that the first meet ing of stockholders must be held within the home state i complied with by means of proxies. The non-resident incor porators send their proxies to the attorney or other agent wh represents the company within the state in which the corpora tion is to be formed, who thereupon holds the first meetin of stockholders, transacts all necessary business, complies wit all the legal requirements, prepares the proper minutes of th meeting, has them duly signed by the acting president an secretary of the meeting, and turns the minutes and the com pany over to its "incorporators" legally qualified to conduc its business. Such meetings, though purely formal, are per fectly legal.

The following minutes of first meetings are drawn i compliance with the laws of New Jersey. They may be easil adapted to the requirements of any other state by a few sligh modifications.

Form 30. Minutes of Stockholders' Meeting

THE IMPERIAL GAS STOVE COMPANY

OF NEW JERSEY

MINUTES OF FIRST MEETING OF STOCKHOLDERS

Held December 5, 1917

Pursuant to written call and waiver of notice signed by all of the i corporators, the first meeting of stockholders of The Imperial Gas Sto Company was held in the office of Harvey K. Wilson, No. 24 Mor

Street, Newark, New Jersey, at 3 o'clock in the afternoon, on the 5th day of December, 1917.

Sidney F. Horner called the meeting to order and on motion, George P. Goff was elected Chairman, and Warren Calvert was appointed Secretary of the meeting.

The Secretary presented and read the call and waiver of notice pursuant to which the meeting was held. On motion it was ordered to be entered in the minute book following the minutes of the meeting. (See Form 31.

The proxy of Martin Coleman appointing Herbert J. Martin his representative was presented, and no objection being made was ordered to be entered in the minute book following the minutes of the meeting.

There were present in person:

NAMES	NO. OF SHARES
George P. Goff	1
W. S. Phillips	1
Sidney F. Horner	1
Warren Calvert	1

There were present by proxy:

NAMES	NAME OF PROXY	NO. OF SHARES
Martin Coleman	Herbert J. Martin	1

The chairman presented a certified copy of the Certificate of Incorporation and stated that the original had been recorded in the office of the Clerk of Essex County on the 3d day of December, 1917, and was filed in the office of the Secretary of State at Trenton, on the 4th day of December, 1917, and that the organization tax and statutory filing and recording fees had been duly paid. On motion it was ordered that the said Certificate of Incorporation be entered on the first pages of the Book of Minutes. (See Forms 1-4.)

The Secretary presented a form of By-Laws prepared by Counsel for the Company, which was read article by article and as a whole unanimously adopted and was ordered to be entered in the Book of Minutes immediately following the Certificate of Incorporation. (See Forms 6-7.)

The Chairman announced that the next business in order was the election of five directors as provided in the by-laws and thereupon appointed Messrs. Thomas Felton and Charles C. Kendall inspectors. Said inspectors were duly sworn and proceeded to open the polls and receive ballots. All the stockholders present in person or by proxy having voted, the inspectors reported that ballots were cast as follows:

FOR DIRECTORS	VOTES
George P. Goff	5
W. S. Phillips	5
Sidney F. Horner	5
Warren Calvert	5
Martin Coleman	5

and that the gentlemen named were therefore duly elected directors of the Company. It was ordered that the oath and report of the inspectors be entered in the Minute Book following the minutes of the meeting. (See Form 33.)

On motion duly made and seconded, the following resolution wa unanimously adopted:

RESOLVED, That the principal office of this Company in the Stat of New Jersey shall be at No. 24 Morris Street, Newark, and th agent in charge upon whom process may be served, shall be Harve K. Wilson.

The Secretary presented a waiver of notice of assessment and of th time and place of payment thereof, signed by all the incorporators. Th waiver was ordered to be entered in the Minute Book following the min utes of the meeting. (See Form 34.)

The Secretary presented a proposal from Richard White, of Sout Orange, New Jersey, offering to assign to the Company in exchange fo its entire common stock, the United States letters patent granted to hi for Improvements in Gas Heating Apparatus, together with his agree ment to assign to the Company any future inventions or improvement made by him in Gas Heating Apparatus.

Said proposal was ordered received and the following resolution i regard thereto was moved, seconded and unanimously adopted:

WHEREAS, Richard White, for and in consideration of th issue to his order of the entire common stock of this Compan of the par value of One Hundred Thousand Dollars ($100,000) has offered to sell and assign to this Company the United State rights for his Improvements in Gas Heating Apparatus, togethe with his agreement to assign to the Company all future improve ments and inventions in Gas Heating Apparatus, all as set fort in his written proposal submitted to this meeting; and

WHEREAS, It appears to the stockholders of this Company tha such property is necessary for the business and lawful purpose of the Company, and that the same is of the reasonable value o One Hundred Thousand Dollars ($100,000):

NOW, THEREFORE, BE IT RESOLVED, That the Board of Director of this Company be and hereby are authorized and empowered an directed to accept the said proposition and to issue the said com mon stock of this Company in exchange for the said letters paten and agreement of the said Richard White.

There being no further business, the meeting was declared adjourned

GEORGE P. GOFF, *Chairman* WARREN CALVERT, *Secretary*

In pursuance of the motions of the preceding minutes, the followin forms are entered in the minutes:

1. Certificate of Incorporation
2. By-Laws
3. Call and Waiver of Notice
4. Proxy of Martin Coleman
5. Oath and Report of Inspectors of Election
6. Waiver of Notice of Assessment

WARREN CALVERT, *Secretary*

Instruments received and filed during the course of a meeting are frequently ordered embodied in the minutes instead of following them. There is no legal objection to either arrangement. The minutes are, however, clearer and more closely connected when the instruments are appended instead of being brought into the body of the minutes.

Form 31. Call and Waiver of Notice—Stockholders'

THE IMPERIAL GAS STOVE COMPANY

CALL AND WAIVER OF NOTICE
FOR
FIRST MEETING OF STOCKHOLDERS

We, the undersigned, being all of the incorporators of the above-named corporation and all of the subscribers to its capital stock entitled to notice of said meeting, do hereby call the first meeting of the stockholders of said corporation to be held in the office of Harvey K. Wilson, No. 24 Morris Street, Newark, New Jersey, at 3 P.M., on the 5th day of December, 1917, for the purpose of receiving the charter, adopting by-laws, electing directors, considering and acting upon a proposal for the issue of the capital stock of the corporation in exchange for property, and the transaction of all such other business as may be necessary or convenient in connection with the organization of said corporation, and we do hereby waive all requirements as to notice or publication of the time, place, and purposes of this first meeting and do consent to the transaction thereat of any and all business pertaining to the affairs of the Company.

Dated Newark, N. J., December 4, 1917.

GEORGE P. GOFF
W. S. PHILLIPS
SIDNEY F. HORNER
WARREN CALVERT
MARTIN COLEMAN
HAROLD ARNOLD

This call and waiver must be signed by every person entitled to be present at the meeting, although the presence of any person not signing the waiver would be held in itself to be a waiver of notice and an acceptance of the call.

Form 32. **Proxy**

THE IMPERIAL GAS STOVE COMPANY

PROXY
FOR
FIRST STOCKHOLDERS' MEETING

Know All Men By These Presents:

That I, the undersigned, one of the incorporators and a subscriber t the stock of the above-named corporation, do hereby constitute and appoin George P. Goff, my true and lawful attorney, with full powers of substi tution and revocation, to represent me at the first meeting of the stock holders of said corporation to be held on the 5th day of December, 1917 and at any meeting postponed or adjourned therefrom, hereby granting my said attorney full power and authority to act for me at said meeting and in my name, place, and stead to vote thereat upon the said stock o said corporation subscribed for by me, or upon which I may then b entitled to vote, in the election of directors and in the transaction of an and all other business pertaining to the affairs of the Company that ma be brought before said meeting, all as fully as I might or could do if per sonally present, and I hereby ratify and confirm all that my said attorney or his substitute, shall lawfully do at such meeting in my name, place, an stead.

IN WITNESS WHEREOF, I have hereunto affixed my signature an seal, this 4th day of December, 1917.

MARTIN COLEMAN [L. S.]

In presence of
PATRICK SULLIVAN

In New York the oath and certificate of inspectors o election must be filed in the office of the county clerk. I New Jersey this is not required, nor need the inspectors b sworn.

In the majority of the states inspectors of election are no required by law. They are, however, usually appointed i order to secure the proper conduct of the election and a forma report of its results. The following form will serve in an such cases, the oath being omitted if it is not deemed neces sary.

Form 33. Inspectors' Oath and Report

INSPECTORS' OATH AND REPORT

STATE OF NEW JERSEY }
COUNTY OF ESSEX } *ss.*:

We, the undersigned, the duly appointed Inspectors of Election of the Imperial Gas Stove Company, being severally sworn, upon our respective oaths, do undertake and swear that we will faithfully, honestly, and impartially perform our duties as Inspectors at the election of directors of said Company, to be held this 5th day of December, 1917, and that we will make a true report of the results of said election.

THOMAS FELTON
CHARLES C. KENDALL

Subscribed and sworn to before me
this 5th day of December, 1917.
FERGUS K. WILLIE,
Notary Public

We, the undersigned, Inspectors of Election, duly appointed to conduct the election for directors of the Imperial Gas Stove Company at the meeting of the stockholders thereof, held this date at the office of the Company, No. 24 Morris Street, Newark, New Jersey, do hereby certify and report that we being first duly sworn by oath hereunto annexed, did hold and conduct the said election by ballot in due form and that the votes cast thereat are as follows:

NAMES	VOTES RECEIVED
George P. Goff	5
W. S. Phillips	5
Sidney F. Horner	5
Warren Calvert	5
Martin Coleman	5

THOMAS FELTON
CHARLES C. KENDALL

Newark, New Jersey,
December 5, 1917.

(For other forms of Inspectors' Reports see Forms 105, 106, 107, 108.)

The following form is local. If not adopted, thirty days' notice must be given the incorporators before their subscriptions can be enforced under the laws of New Jersey.

Form 34. Waiver of Notice of Assessment

WAIVER OF NOTICE OF ASSESSMENT

We, the undersigned, subscribers to the Capital Stock of the Imperi Gas Stove Company of New Jersey, hereby waive notice of the tim and place of payment of our respective subscriptions to the Capital Stoc with which said Company begins business, and also waive all other r quirements of the laws of New Jersey as to notice of assessment an payment thereof, and we agree to pay our respective subscriptions to th Treasurer of the Company in such amounts and at such times as th Board of Directors may require.

Newark, New Jersey,
December 5, 1917.

GEORGE P. GOFF
W. S. PHILLIPS
SIDNEY F. HORNER
WARREN CALVERT
MARTIN COLEMAN

The first meeting of directors usually follows immediatel after the first meeting of stockholders, its precise date or tim being fixed by the call and waiver of notice signed by th newly elected directors. Unless notice is waived by all of th newly elected directors, the first meeting of directors is calle as a special meeting in accordance with the requirements o the by-laws of the company, or otherwise the directors wai until the time fixed by the by-laws for their first regula meeting.

Form 35. Minutes—Directors'

IMPERIAL GAS STOVE COMPANY
OF NEW JERSEY

MINUTES OF FIRST MEETING OF DIRECTORS
Held December 5, 1917

Pursuant to written call and waiver of notice the Board of Directo of the Imperial Gas Stove Company held its first meeting in the offi of Harvey K. Wilson, No. 24 Morris Street, Newark, New Jersey, 4 P. M., on the 5th day of December, 1917.

W. S. Phillips called the meeting to order and on motion, George P. Goff was elected Chairman, and Warren Calvert was appointed Secretary of the meeting.

There were present:

George P. Goff
W. S. Phillips
Sidney F. Horner
Warren Calvert

constituting a quorum of the Board. Absent: Martin Coleman.

The Secretary presented the call and waiver of notice signed by all the Directors, pursuant to which the meeting was held. It was ordered spread upon the Minute Book immediately following the minutes of the meeting. (See Form 36.)

The Chairman announced the first business in order to be the election of officers to serve for the remainder of the corporate year and until the election of their successors, and appointed Messrs. Harvey K. Wilson and Warren Calvert tellers to conduct the election. The votes of those present were duly cast by ballot, resulting in the unanimous election of the following officers:

President	George P. Goff
Vice-President	Martin Coleman
Secretary	Warren Calvert
Treasurer	W. S. Phillips

It was ordered that the Secretary be sworn and subscribe a written oath of office, and that said oath be spread upon the Minute Book immediately following the minutes of the present meeting. The Secretary thereupon took said oath and entered upon the discharge of his duties. (See Form 37.)

It was ordered that the Treasurer give bond as provided in the by-laws, in the sum of Five Thousand Dollars ($5,000), the form and sureties of same to be approved by the Board of Directors. The Treasurer thereupon submitted a bond signed by himself as principal and by the Fidelity Surety Company of Maryland as surety. The bond as presented was approved and ordered to be filed in the custody of the Secretary of the Company.

Upon motion duly made and seconded the following resolutions were unanimously adopted:

Resolved, That the officers of the Company be authorized to lease an office for the use of the Company at No. 30 Broad Street, New York City, the rental thereof not to exceed Eighty Dollars ($80) per month, and that the meetings of the Board of Directors be from time to time held there or at the designated office of the Company in the State of New Jersey as the Board of Directors may appoint.

Resolved, That the Treasurer be and hereby is authorized and instructed to open an account for the Company with the Seaboard National Bank of New York City, and to deposit therein all funds of the Company coming into his possession, such account to be in the name of the Company and funds deposited therein to be withdrawn only by check signed by the Treasurer and countersigned by the President.

RESOLVED, That certificates for common and preferred stock as submitted to the Board and identified by the signature of the President, be and hereby are adopted as the stock certificates of the Company, and that the same be attached to the pages of the Minute Book immediately following the minutes of the present meeting.

RESOLVED, That the Secretary be instructed to procure Five Hundred (500) certificates of common stock and Five Hundred (500) certificates of preferred stock in form as adopted, also a corporate seal as provided in the by-laws, and in addition thereto such records, stock and transfer books, books of account, and stationery and office supplies as may be necessary for the proper conduct of the Company's operations and business.

RESOLVED, That the Treasurer be hereby authorized and instructed to pay from the Company funds all expenses properly incurred in connection with the incorporation of the Company, the total of such payments not to exceed Three Hundred Dollars ($300).

RESOLVED, That an assessment of One Hundred Per Cent (100%) be levied upon the shares of stock subscribed for by the incorporators as shown by the certificate of incorporation.

RESOLVED, That the Secretary prepare the certificate of election of directors and officers required by the New Jersey statutes, and that the proper officers of the Company execute and file the same in the office of the Secretary of State of New Jersey within thirty days from date, and that a copy thereof be spread upon the Minute Book immediately following the minutes of the present meeting.

The President then brought to the attention of the meeting (1) the written proposal of Mr. Richard White of South Orange, New Jersey to transfer and assign his Patents for Gas Heating Apparatus to the Company, together with an agreement to assign all future inventions and improvements in gas heating apparatus made by him, in exchange and full payment for the entire common stock of the Company, and (2) the resolution of the stockholders approving said proposal and instructing the Board of Directors to accept the same.

Mr. White's proposal was ordered received and spread upon the Minute Book immediately following the minutes of the present meeting, and on motion duly made and seconded the following resolution relating thereto was unanimously adopted:

WHEREAS, The property offered by Richard White in exchange for the entire common stock of this Company is adjudged by this Board to be of the reasonable value of One Hundred Thousand Dollars ($100,000) and to be necessary for the use and lawful purposes of this Company:

NOW, THEREFORE, BE IT RESOLVED, That the said proposed assignment of Letters Patent and the agreement for the assignment of future rights and patents in exchange for the entire common stock of this Company, as set forth in the said proposition of Richard White as spread upon the Minute Book of this Company, is hereby accepted and the proper officers of the Company are hereby authorized and instructed to receive the duly executed assignments and agreements of said Richard White in form approved by Counsel for the Company, and to issue in exchange therefor, the entire common stock of the Company consisting of One Thousand (1,000) Shares of the par value of One Hundred Dollars ($100) per share, to such person or persons as may be designated by the written

orders of the said Richard White, and to do all other things necessary and convenient to consummate the said exchange and issue of stock for property.

There being no further business, the meeting was adjourned.

WARREN CALVERT,
Secretary

GEORGE P. GOFF,
President

In pursuance of the motions of the preceding minutes, the following forms are hereunto appended:

1. Call and Waiver of Notice
2. Secretary's Oath of Office
3. Report to Secretary of State
4. Forms of Stock Certificates—Common and Preferred
5. Written Proposal of Richard White to Exchange Property for the Common Stock of the Company

WARREN CALVERT
Secretary

The forms required by these minutes follow in part. The treasurer's bond is omitted as being too lengthy for the available space. Forms may be obtained from any surety company. The report to the Secretary of State is also omitted as being local and unnecessary. Blanks for this report may be obtained by application to the Secretary of State at Trenton, New Jersey. Forms of stock certificates are given in Chapter LXVI, "Stock Certificates and Stock Books."

Form 36. Call and Waiver—Directors'

THE IMPERIAL GAS STOVE COMPANY

CALL AND WAIVER OF NOTICE
FOR
FIRST MEETING OF DIRECTORS

We, the undersigned, being all of the directors of The Imperial Gas Stove Company, do hereby call the first meeting of the Directors of said Company to be held in the office of Harvey K. Wilson, No. 24 Morris Street, Newark, N. J., at 4 P.M., on the 5th day of December, 1917, for the purpose of electing officers, acting upon a proposal to assign

property to the Company in exchange for stock, and for doing all such other things as may be necessary or desirable in connection with the organization of the Company or the promotion of its business, and we hereby waive all statutory or by-law requirements as to notice of time, place, and objects of said meeting and consent to the transaction thereat of any and all business pertaining to the affairs of the Company.

Newark, New Jersey,
December 5th, 1917.

GEORGE P. GOFF
W. S. PHILLIPS
SIDNEY F. HORNER
WARREN CALVERT
MARTIN COLEMAN

Frequently when directors' meetings are to be assembled by call and waiver, the signatures of all the directors are not secured at the time but are secured subsequently—and sometimes long after the date of the meeting. It is worthy of note that it has been held that a director's signature to waiver after the meeting "looking to ratification of what was done is without force to validate the action taken."[1] In this case the action of the meeting held pursuant to a waiver signed by some of the directors after the meeting, was held to be invalid.

Form 37. Secretary's Oath of Office

SECRETARY'S OATH

STATE OF NEW JERSEY
COUNTY OF ESSEX } *ss.:*

Warren Calvert, the Secretary of the Imperial Gas Stove Company being by me duly sworn, upon his oath, does promise and swear that he will faithfully and impartially discharge the duties of Secretary of said Company to the best of his skill and ability.

WARREN CALVERT

Subscribed and sworn to before me
this 5th day of December, 1917.

HENRY H. FRANK,
Commissioner of Deeds for
the State of New Jersey

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[1] Holcombe *et al.* v. Trenton White City Co., 82 Atl. (N. J.) 618 (1912).

The New Jersey statutes require that the Secretary be sworn. Elsewhere the formality would seem to be unnecessary.

Form 38. Proposal to Exchange Property for Stock

PROPOSAL TO EXCHANGE PROPERTY FOR STOCK

To the IMPERIAL GAS STOVE COMPANY,
No. 24 Morris Street,
Newark, N. J.

GENTLEMEN:—

I hereby offer in exchange and full payment for the Common Stock of your Company, amounting to One Thousand (1,000) Shares of the par value of One Hundred Dollars ($100) per share, United States Letters Patent, No. 605,948, issued to me October 7, 1917, for Improvements in Gas Heating Apparatus, said Patent to be assigned to your Company together with my agreement to assign without further consideration all other inventions and improvements in gas heating apparatus which I may at any time hereafter own or control.

The said One Thousand (1,000) Shares of Stock is to be issued to my order, full-paid and non-assessable, against the delivery to your Company of due assignments of said Letters Patent and of my duly executed agreement for the assignment of any future inventions and improvements that I may make in gas heating apparatus.

Yours truly,

New York City,
December 5, 1917.

RICHARD WHITE

This proposal provides for the issue of the entire common stock in exchange for the property mentioned. Usually the incorporators subscribe for at least a portion of the common stock of the company. On the face of it, therefore, the proposal calls for the issue of stock already under contract to the incorporators and this must be adjusted in some way before the proposal is accepted. The matter may be simply arranged in either one of two ways: by agreement with the party making the proposal, that his payment—as far as the incorporators' subscriptions are concerned—may be regarded

as paid on their account, the stock being issued to them; or the incorporators may assign their subscriptions to the party making the proposal. If this latter plan is adopted, the following form will apply:

Form 39. Assignment of Subscriptions

ASSIGNMENT OF SUBSCRIPTIONS

We, the undersigned, all the subscribers to the Common Stock of the Imperial Gas Stove Company, for and in consideration of the sum of One Dollar to each of us in hand paid, and of other good and valuable considerations, the receipt of which is hereby acknowledged, do hereby respectively sell, assign, and make over unto Richard White all our subscription rights to the stock of said Company;

Provided, however, that this assignment is conditioned upon the acceptance by said Company of the proposal of said Richard White of this date to purchase the entire Common Stock of said Company, and is to go into effect only upon due tender by him of payment for said Common Stock in accordance with the terms of the said proposal.

Witness our hands and seals this 5th day of December, 1917.

GEORGE P. GOFF
W. S. PHILLIPS
SIDNEY F. HORNER
WARREN CALVERT
MARTIN COLEMAN

Under some circumstances it is impossible to secure the signatures of all the directors to a call and waiver. In such case, if by-laws have been adopted by the stockholders and the first regular meetings of directors under these is near at hand the business of the first meeting may be postponed until this regular meeting. Usually, however, a more immediate meeting is necessary, and in such case it must be assembled by means of a call.

In the absence of any conflicting provision in the by-laws such call signed by a majority of the board of directors will be effective. The following form may be used.

Form 40. Call for First Directors' Meeting

CALL FOR FIRST MEETING OF DIRECTORS
of the
MIDVALE COAL COMPANY

We, the undersigned, directors of the Midvale Coal Company, hereby call the first meeting of the directors of said Company to be held in the office of John H. Welch, 229 Broadway, New York City, New York, at 3 P.M. on the 2nd day of January, 1918, for the purpose of electing officers, acting upon a proposal to assign property to the Company in exchange for stock, and doing all such other things as may be necessary or desirable in connection with the organization of the Company and the promotion of its business.

New York City,
December 30, 1917.

THOMAS L. SHERMAN
DANIEL T. BROWN
JOHN H. WELCH

Under ordinary conditions the period between the sending of notice and the time of meeting must be sufficient to allow every member of the board to receive the notice and be present at the meeting. Any by-law provisions as to the number of days to elapse between the notice of the special meeting and the special meeting held pursuant thereto, should be observed.

The directors' minutes on a preceding page give a form of resolution for designating the corporate depositary. This form is simple but sufficient for all practical purposes. In many cases, however, the banks have their own forms of designating resolution which they prefer and in some cases insist upon. These forms are for the most part unobjectionable, but in some cases will be found to confer excessive powers upon the officers of the corporation. If this is not desired, any such resolution may be so modified as to meet the requirements of the particular corporation while still preserving the general form preferred by the bank.

The banks usually require the resolution designating the

corporate depositary to be certified. Such certification is best made by the secretary of the company and may be in the following form:

Form 41. Secretary's Certificate to Resolution

I, Warren Calvert, Secretary of the Imperial Gas Stove Company, of New Jersey, do hereby certify that the foregoing is a full and true transcript of a resolution duly adopted at a regular meeting of the Board of Directors of the said Company held in the City of Newark, New Jersey, on the 5th day of December, 1917, as it appears on the minutes of said meeting; and I do further certify that George P. Goff is the duly elected President of said Company, and W. S. Phillips is its duly elected Treasurer.

In Witness Whereof, I have hereunto affixed my official signature and the corporate seal of said Company this 6th day of December, 1917.

{ CORPORATE SEAL }

Warren Calvert,
Secretary

This certificate appears below the resolution designating the corporate depositary on the same sheet of paper.

CHAPTER LXIX

OPTION AGREEMENTS

When a corporation is to be formed for the purpose of purchasing or taking over certain properties, option contracts are usually employed to hold these properties until the corporation can be organized and act for itself. Such contracts, even though made by trustees for the corporation, are not binding upon the corporation until accepted or ratified by its formal action. In drawing such contracts, therefore, care should be taken that the parties acting for the corporation are not unintentionally bound or involved by its terms. Payments made to secure the option are usually forfeited in case the option fails, but this should mark the limit of loss of the party contracting for the property unless otherwise expressly agreed and stated in the option contract.

Form 42. Option on Capital Stock

OPTION AGREEMENT

An Agreement made and entered into this 14th day of November, 1917, by and between John H. Wyckoff of Philadelphia, Pennsylvania, party of the first part, and George Andrew Dennison of New York City, party of the second part:

WHEREAS, The said John H. Wyckoff owns or controls the capital stock of the Wyckoff Publishing Company, a corporation duly organized under the laws of Delaware and carrying on its business in the City of Philadelphia, said business being the publication of "The Tea Table," a monthly magazine owned by the said Wyckoff Publishing Company; and

WHEREAS, The said George Andrew Dennison owns or controls a monthly magazine known as "The Daily Menu" and desires to purchase and combine therewith "The Tea Table," and to form a corporation to own and publish the magazines so combined;

NOW, THEREFORE, In consideration of the sum of Two Hundred and Fifty Dollars ($250) paid the said Wyckoff by the said Dennison, the

receipt whereof is hereby acknowledged, the said Wyckoff for himself and his associates agrees to sell to said party of the second part or his assigns, at any time on or before the 1st day of May, 1918, all and singular the entire right, title, and interest in and to the said monthly magazine, including subscription lists, advertising contracts, good-will, and all things incident to or pertaining to said magazine and its publication or at the option of said party of the second part, the entire capital stock of the aforementioned Wyckoff Publishing Company, consisting of Four Hundred (400) Shares of Common Stock of the par value of Forty Thousand Dollars ($40,000); the consideration for the transfer and assignment of said Magazine, or said capital stock, to be Twenty Thousand Dollars ($20,000) in cash and one-fourth of the capitalization of the corporation formed to take over said publication.

This option shall expire and be of no further force or effect after the 1st day of May, 1918, unless on or before that date said Dennison or his assigns shall deposit with the Guaranty Trust Company of 140 Broadway, New York City, said sum of Twenty Thousand Dollars ($20,000) in cash, together with certificates issued in the name of John H. Wyckoff, for one-fourth of the entire capital stock of said new corporation, said cash and stock to be held in escrow by the said Guaranty Trust Company and to be released and delivered to the said Wyckoff upon the delivery to said Trust Company of a duly executed and valid assignment of said Magazine to said new corporation, or otherwise of the entire duly assigned stock of the Wyckoff Publishing Company, as may be required by the written demand of the said Dennison or his assigns, as hereinafter set forth.

So soon as said cash and stock of the said new company are deposited in escrow as afore provided with the Guaranty Trust Company, said Dennison or his assigns shall give said Wyckoff written notice thereof and shall specify therein whether said Dennison desires the assignment of said Magazine, or the stock of the said Wyckoff Publishing Company in exchange for the said escrowed cash and stock, and said Dennison shall at the same time file a signed copy of said notice with the Guaranty Trust Company.

It is understood and agreed that should the sale contemplated by this present agreement fail, neither party hereto shall be liable in any way under or by reason of this present agreement, and that should this option be assigned to any other person or to any corporation, the said Dennison shall be free from all liability thereunder.

In Witness Whereof, the said John H. Wyckoff and the said George Andrew Dennison have hereunto affixed their respective signatures and seals the day and year first above written.

John H. Wyckoff [L. s.]
George Andrew Dennison [L. s.]

Attest signatures:
Mary M. Westcott
Willis Bennett

In this option no provision is made for any change during the option period in the value of the property covered. In

the option which follows, such changes are guarded against by means of the provision that the price is to be the appraised value at the time of purchase plus a fixed amount for good-will.

Form 43. Option on Business and Property

OPTION AGREEMENT

An Agreement entered into this 25th day of October, 1917, by and between the Oswego Hub and Spoke Company, a corporation duly organized under the laws of the State of New York, party of the first part, and Willis P. Emerson of New York City, party of the second part.

For and in consideration of the sum of One Dollar paid said party of the first part by the party of the second part, receipt whereof is hereby acknowledged, and for other good and valuable considerations, said party of the first part does hereby agree to sell to said party of the second part, as a going concern, its entire business, factories, and plant for the manufacture and sale of hubs and spokes, owned and operated by said party of the first part in the City and County of Oswego, State of New York, including therewith all machinery, tools, and other property and appurtenances thereunto belonging, together with all raw materials and manufactured products on hand, and all contracts relating to the purchase or sale of such materials and products; also the good-will of said business and all trade-marks, brands, patent rights, licenses, and shop rights used therein and controlled by said party of the first part; excepting only moneys and bills and accounts receivable on hand at the time of sale; all of said property to be delivered free and clear from all liens, charges, encumbrances, taxes, and assessments, save and except for a certain mortgage upon the real property of the party of the first part, amounting to Thirty Thousand Dollars ($30,000) and now on record in the office of the County Clerk of Oswego County.

The price to be paid for said property shall be an amount Twenty Thousand Dollars ($20,000) in excess of the actual appraised value, at the time of purchase, of said real and personal property, exclusive of good-will, as above set forth, and such amount shall be paid in cash at the time of transfer, the aforementioned mortgage being assumed by the purchaser and accounted as a cash payment to the amount of said sum of Thirty Thousand Dollars ($30,000) and accrued interest thereon due at the time.

This option shall expire and be of no further effect on and after the 31st day of July, 1918, unless prior thereto said party of the second part, or his assigns shall, in writing, notify said party of the first part of his or their intention to exercise the same, and shall at that time deposit in the Oswego National Bank, Ten Thousand Dollars ($10,000) in cash as a guarantee of good faith and to apply upon the purchase of said property, and in such event the party of the first part shall within sixty days of such notice and deposit, transfer and convey said

business and property by such deeds, conveyances, and assignments and other instruments as may be necessary to vest the full right, title, and interest in said business and property in said party of the second part or his assigns.

It is further understood and agreed that said party of the second part assumes no responsibility to purchase said property unless he or his assigns shall elect so to do by written notice and deposit in bank as afore provided, and that in case of assignment of this present instrument by said party of the second part, all its provisions shall inure to the benefit of, and run in favor of, and be binding upon his assignee or assignees in every respect as theretofore upon said party of the second part, and in case of such assignment the said party of the second part shall be free from all liability hereunder.

In case of any disagreement as to the terms of this option or as to any matters connected with the exercise thereof, each party hereunto shall appoint an arbitrator and the two so appointed shall appoint a third, and the three arbitrators so selected shall be empowered to decide finally all matters of disagreement.

IN WITNESS WHEREOF, the Oswego Hub and Spoke Company, party of the first part has caused its corporate name to be hereunto signed by its President and its duly attested seal to be hereunto affixed by its Secretary, and the party of the second part has affixed his signature and seal, all on the day and year first above written.

OSWEGO HUB AND SPOKE COMPANY,

{ CORPORATE SEAL }

BY JAMES O'REILLY,
President

Attest seal:

HARRIS N. SEELEY,
Secretary

WILLIS P. EMERSON [L. S.]

Witness signature of W. P. Emerson:

MARY N. BATES
CLARENCE WYMOND

Form 44. Option on Real Estate

OPTION AGREEMENT

This Agreement made this 18th day of November, 1917, for the sale of Real Estate, by and between Marcus M. McComb, party of the first part, and Melville H. Winthrop, party of the second part, witnesseth as follows:

1. That said party of the first part in consideration of Five Hundred Dollars ($500) to him in hand paid, does hereby agree to grant and convey to the party of the second part, his heirs, administrators, and

assigns, all that certain lot of land together with the buildings, structures, and improvements thereon, situated, bounded, and described as follows:

(Full description)

2. That said party of the first part, hereby agrees to receive and accept in full payment for the said property, the sum of Twenty-Five Thousand Dollars ($25,000), payable Ten Thousand Dollars ($10,000) cash on delivery of deed, and the remainder in three equal payments at one, two, and three years respectively, said deferred payments to be secured by mortgage on the said property and to bear interest at the rate of Six Per Cent (6%) per annum.

3. That said premises are to be conveyed subject to the following encumbrances.

(*Description of Encumbrances*)

4. That said party of the first part agrees to convey said property free from all liens and encumbrances, save as above specified, by such proper warranty deed containing full covenants duly executed and acknowledged, as shall convey and assure to the grantee the absolute fee of said premises.

Provided, However, That unless said party of the second part or his assigns, tenders the said amount of Ten Thousand Dollars ($10,000) and duly executed mortgage for the remainder of such purchase price on or before March 1st, 1918, this agreement shall terminate and be of no force or effect and the party of the second part shall forfeit the amount already paid on this Option Contract, but no further liability of any kind shall be incurred by either of the parties hereunto.

Witness the hands and seals of the said parties.

MARCUS M. MCCOMB [L. S.]
MELVILLE H. WINTHROP [L. S.]

In the presence of

SAMUEL M. BOSWICK
ELLEN M. JUDSON

(*Notarial acknowledgment according to the law of the state in which the contract is executed.*)

In the absence of any prohibiting provisions or conditions, an option contract is assignable as is any other form of contract. A simple option assignment is as follows:

Form 45. Assignment of Option

ASSIGNMENT OF OPTION

WHEREAS, The undersigned holds and is the lawful owner of a certain Option Contract, executed by the George F. Harper Company, of Philadelphia, Pennsylvania, the undertaking of which is the sale of the wholesale hardware business now belonging to and conducted by the said George

F. Harper Company, at No. 1725 Chestnut Street, in the City of Philadelphia, said business being more particularly specified and described in the said Option Contract hereunto attached and made part of this assignment:

Now, THEREFORE, I, Theodore Paflin, in consideration of the sum of One Dollar, the receipt whereof is hereby acknowledged, and for other valuable and sufficient considerations, do by these presents grant, bargain, sell, transfer and assign unto the Allis-White Hardware Company, a corporation duly organized under the laws of the State of New York, all and singular, my entire right, title, and interest in and to the said Option Contract, to have and hold the same to the proper use and benefit of the said corporation.

Witness my hand and seal this 16th day of December, 1917.

THEODORE PAFLIN [L. S.]

Attest:

IRVIN M. ROGERS

CHAPTER LXX

CALLS AND WAIVERS FOR STOCKHOLDERS' MEETINGS

Regular meetings both of stockholders and directors are held at fixed times usually prescribed by the by-laws. If in the interim between these regular meetings matters arise calling for action, special meetings become necessary. Such meetings are assembled either by the call and waiver, or by a formal call followed by notice.

The call and waiver is a single instrument consisting of two parts; first, a call for the desired meeting and, second, a waiver of all statutory, charter, or by-law requirements for notice thereof. This call and waiver must be signed by every person entitled to be present at its meeting. Those signing are thereby estopped from any future objection to the omission of the usual or required formalities of the meeting. No one else has a right to object; hence the call and waiver may be safely used even though the by-laws provide a different method of assembling special meetings.

The call followed by notice is the method of assembling special meetings usually prescribed by the by-laws, and involves the use of two separate instruments: first, the call signed by some competent party or parties; and second, pursuant to this call, a notice of the meeting. The call and waiver permits of an immediate meeting, or a later meeting, according to its terms. The call with notice involves the delay incident to formal notice, ranging from three to ten days.

The first meetings of both stockholders and directors are usually assembled by means of calls and waivers. It

is, however, but seldom that the call and waiver is employe thereafter to assemble meetings of stockholders, on accoun of the difficulty—save in the smaller corporations—of secur ing the signature of every party entitled to be present at th meeting. Special meetings of the directors are commonl assembled by means of the call and waiver.

Forms of calls and waivers to assemble the first meeting of stockholders and directors have already been presented (See Forms 31, 36.) The following form is for use afte organization:

Form 46. Call and Waiver for Special Meeting

CHELTINGHAM LINEN COMPANY

CALL AND WAIVER
SPECIAL MEETING OF STOCKHOLDERS

We, the undersigned, being all the stockholders of the Cheltingham Linen Company of Trenton, New Jersey, hereby call a special meetin of the stockholders of said Company to be held in the Company's offic No. 275 Main Street, Trenton, New Jersey, on the 21st day of Octobe 1917, at 3 o'clock in the afternoon, for the purpose of considering an acting upon a proposition for the consolidation of this Company with th Wilson Thread Company of Trenton, New Jersey, and we hereby waiv all statutory and by-law requirements as to notice of time, place, an objects of said meeting, and agree to the transaction thereat of any an all business pertaining to the affairs of the Company.

Trenton, N. J.,
October 17, 1917.

JAMES H. MCLAIN
THEODORE MCGOWAN
JOSEPH H. FRENCH
CHARLES P. HENDERSON
DAVID B. ADAMS
FRANK H. SMALL
WILLIAM T. MASTERS
JOHN H. MEADE
HENRY T. ARNOLD
WILLIAM ROLLANDS

Where the number of stockholders is large, the call fol lowed by notice is used in assembling special meetings. Th call itself authorizes the meeting as set forth in its terms

When a call for a special meeting is issued by the presi dent, it should be directed to the secretary.

Form 47. President's Call for Special Meeting

HUDSON NAVIGATION COMPANY

270 Broadway, New York

Mr. HENRY H. SHELDON,
Secretary of the HUDSON NAVIGATION CO.:

You are hereby authorized and instructed to send out notice of a special meeting of the stockholders of this Company hereby called by me, said meeting to be held in the office of the Company, No. 270 Broadway, New York City, on the 15th day of September, 1917, at 10 o'clock A.M., for the purpose of considering and acting upon a proposition to sell the entire property and assets of the Company, and for the transaction of any and all business in connection therewith that may properly come before said meeting.

September 1, 1917. HARRY M. MOODY,
President

This call is handed or sent to the secretary who thereupon sends out notices of the meeting (Form 59).

Form 48. President's Call for Special Meeting—Formal

HUDSON NAVIGATION COMPANY

270 Broadway, New York

Mr. HENRY H. SHELDON,
Secretary of the HUDSON NAVIGATION CO.

DEAR SIR:—

In accordance with the authority vested in me by the By-laws of this Company, I hereby call a special meeting of the stockholders to be held in the office of the Company, No. 270 Broadway, New York, on the 15th day of September, 1917, at 10 o'clock in the forenoon, for the purpose of considering and acting upon a proposition to sell the entire property and assets of the Company, and for the transaction of any and all business in connection therewith that may properly come before said meeting, and I hereby authorize and instruct you to give due notice of said meeting to the stockholders of this Company in accordance with the requirements of its By-laws.

September 1, 1917. HARRY M. MOODY,
President

A directors' call for a special meeting of stockholders (See Form 58) must, according to the requirements of by-laws, be addressed either to the president, who in his turn instructs the secretary to issue notice of the meeting so called, or to the secretary as in the following form, save when occasionally the by-laws permit direct publication notice by the directors.

Form 49. Directors' Call for Special Meeting

CALL FOR SPECIAL MEETING OF STOCKHOLDERS

We, the undersigned, directors of the Hudson Navigation Company, do hereby call a special meeting of the stockholders of said Company to be held in its office, No. 270 Broadway, New York, on the 15th day of September, 1917, at 10 o'clock in the forenoon, for the purpose of taking action on a proposition to sell the entire property and assets of the Company, and for the transaction of any and all business necessary in connection therewith, and we do hereby authorize and instruct the Secretary of the Company to send out notice of said special meeting in accordance with the by-law requirements of this Company.

New York City, New York,
September 1, 1917.

JOHN H. GOODRICH
HENRY B. MERRILL
ARTHUR C. MCCALL

To Mr. HENRY H. SHELDON,
Secretary of the HUDSON NAVIGATION CO.

This call is handed or sent to the secretary, and is followed by his notice of the meeting. When the by-laws provide that the president shall call special meetings on written request or instruction signed by a prescribed number of directors, the foregoing call might be modified to meet the conditions as follows:

Form 50. Directors' Instructions for Special Meeting

To Mr. HARRY M. MOODY,
President of the HUDSON NAVIGATION CO.:

We, the undersigned, directors of the Hudson Navigation Company, do hereby authorize and instruct you to call a special meeting of the stockholders of said Company, to be held in its office, No. 270 Broadway

New York, on the 15th day of September, 1917, at 10 o'clock in the forenoon, for the purpose of taking action on a proposition to sell the entire property and assets of the Company and for the transaction of any and all business necessary in connection therewith.

New York City, New York,
September 1, 1917.

JOHN H. GOODRICH
HENRY B. MERRILL
ARTHUR C. MCCALL

These instructions are handed to the president, who in accordance therewith issues a call for the meeting. (See Forms 47, 48.) If Form 48 is followed, the first phrase, "In accordance with the authority vested in me by the By-laws of this Company," should be modified to correspond, as "Pursuant to written instructions of directors of this Company."

Special meetings of stockholders may always be called by resolution of the board of directors.

Form 51. Directors' Resolution for Special Meeting

RESOLUTION

BE IT RESOLVED, That a special meeting of the stockholders of this Company be and hereby is called, said meeting to be held in the office of the Company at No. 270 Broadway, New York City, on the 15th day of September, 1917, at 10 o'clock in the forenoon, for the purpose of considering and acting upon a proposition to sell the entire property and assets of the Company, and for the transaction of any and all business necessary or desirable in connection therewith.

As the secretary is presumably present at the meeting or otherwise has access to the minutes, the mere passage of such a resolution is sufficient notice to him of the call, and he should send out notice of the meeting.

It is but seldom that the stockholders issue a request or call for a meeting. Usually when they do, it must, in accordance with by-law requirements, pass through the president's hands. If not so prescribed, their call may be

addressed to the secretary, in which case the president's on official knowledge of the meeting is derived from the noti sent him by the secretary. Occasionally the by-laws authori the stockholders to give direct notification of the meeting b publication.

Form 52. Stockholders' Request for Special Meeting

To the President of the
ADAMS MACHINE COMPANY:

We, the undersigned, owning or controlling not less than two-thir of the entire voting stock of the Adams Machine Company, do hereb request you to call a special meeting of its stockholders to be held in th office of the Company at No. 35 Broad St., New York, at 3 o'clock in th afternoon on the 19th day of October, 1917, for the purpose of conside ing the action of the directors of this Company in purchasing, in oppos tion to the expressed wishes of a majority of its stockholders, the machi shop and equipment of the Harrison Metal Working Company, locate at 908 Willoughby St., Brooklyn, and to take such action in regard there as may seem necessary or desirable to the stockholders present at suc meeting, and we request you to have due and timely notice thereof sent each stockholder of this Company.

New York City, N. Y.,
October 1, 1917.

NAME	SHARES OWNE
DAVID H. BENTLEY	200
JAMES J. ALLISON	250
OLIVER P. CHANDLER	500
STANLEY S. WOOD	150
HENRY M. SHERRILL	300
SPENCER HARRISON	150

This stockholders' request is handed to the president, wh may either indorse his call on the request as in the for which follows, or may issue a call as in Forms 47 and 4

Form 53. President's Indorsement of Stockholders' Reque

To the Secretary of the
ADAMS MACHINE COMPANY:

You are hereby instructed to give due notice of a special meeting the stockholders of this Company hereby called by me in pursuance of th within stockholders' request, said meeting to be held in the office of th

Company at No. 35 Broad St., New York City, at 3 o'clock P.M., on the 19th day of October, 1917, in accordance with and for the purposes set forth in the said request.

New York City, N. Y.,
October 2, 1917.

JOHN H. HARRELL,
President

When the stockholders' call is directed to the secretary, its form will be as follows:

Form 54. Stockholders' Call for Special Meeting

To the Secretary of the
HOWARD WOOLEN MILLS CO.:

We, the undersigned, stockholders of the Howard Woolen Mills Company owning or controlling not less than two-thirds of its entire voting stock, do hereby call a special meeting of the stockholders of the Company to be held in its office at No. 45 Main St., Dunkirk, New York, at 12 o'clock noon on the 15th day of October, 1917, for the purpose of considering a proposition to amend the present By-laws so as to restrict the President's power to contract for the Company, and of taking such action in regard thereto as may seem necessary or desirable to the stockholders present at such meeting, and we do hereby authorize and instruct you to send out notices of said meeting in accordance with the terms of this present call.

Dunkirk, New York,
October 5, 1917.

NAMES	SHARES OWNED
HENRY B. CLARKE	575
HARRY H. HOWARD	1200
FRANK B. JOHNSON	725
SAMUEL FURMAN	500

CHAPTER LXXI

CALLS AND WAIVERS FOR DIRECTORS' MEETINGS

Special meetings of directors are usually assembled b means of calls and waivers, except where the board is larg or some of its members are inaccessible. The common forr of call and waiver for directors' meetings is as follows:

Form 55. Call and Waiver for Special Meeting

CALL AND WAIVER

SPECIAL MEETING OF DIRECTORS

We, the undersigned, all the Directors of the Long Island Powe Company of Flushing, Long Island, do hereby call a special meeting o the Board of Directors of said Company to be held in its office at N 285 Duane St., New York City, at 4 o'clock P.M., on this 21st day o October, 1917, for the purpose of acting upon a proposition for the sa of the Company's Flushing plant, and we do hereby waive all statuto and by-law requirements as to notice of time, place, and purposes of sa meeting, and consent to the transaction thereat of any and all busine pertaining to the affairs of the Company.

New York City, N. Y.,
October 21, 1917.

JOHN MCFERGUSON
HAROLD H. HARDING
BENTON CRELLER
HOWARD H. MAURICE
HORACE EVANS

Special meetings of directors are sometimes irregularl assembled, as for instance where all the members of a boar come together on some informal notice or without previou notice, and then and there agree to waive all the usual formal ties and hold an immediate meeting. Such meetings, terme

"consent meetings," are entirely legal and are not uncommon where boards of directors or executive committees are small and easily assembled. (See § 309.)

For such meetings a written validation is not strictly necessary. The participation of all the parties entitled to be present, duly entered on the minutes of the meeting, affords legal evidence of their consent thereto and estops any subsequent objections on their part to the proceedings. As a precautionary measure, however, the secretary should have every member of the board sign the minutes of a consent meeting, or otherwise sign a waiver of notice and agreement to the meeting as given below:

Form 56. Agreement for Consent Meeting

HARRISON CUTLERY COMPANY

WAIVER OF NOTICE

We, the undersigned, all the Directors of the Harrison Cutlery Company, being now present, do hereby consent to an immediate meeting of the Board of Directors of said Company to be held in the office of Henry M. McCall, No. 253 Broadway, New York, at 3 o'clock P.M. this 14th day of October, 1917, and we hereby waive all requirements as to notice of time, place, and purposes of such meeting, and agree to the transaction thereat of any and all business pertaining to the affairs of the Company.

HENRY H. MCCALL
SIMON FRANKENSTEIN
JAMES J. MCCALL
HOWARD H. FRENKEL
STANLEY T. BROWN

The call for a special meeting of directors must be signed as required by the by-laws—usually by the president or a certain number of the directors. A form of president's call is given on the following page.

This call is handed to the secretary who, in accordance with its instructions, follows it up with the usual notice of the meeting. (See Form 67.)

Form 57. President's Call for Special Meeting

CORLISS TYPEWRITER COMPANY
35 Vesey St., New York

October 1, 1917

Mr. John H. Hammond
Secretary Corliss Typewriter Co.

Dear Sir:—

In accordance with the authority vested in me by the By-laws of this Company, I hereby call a special meeting of the Board of Directors to be held in office of the Company on the 15th day of October, 1917, at 3 o'clock in the afternoon, for the purpose of considering and acting upon the appointment of a Western selling agent, and for the transaction of any other business in connection therewith that may be necessary and you are hereby authorized and instructed to send out notices of said meeting as required by the By-laws of this Company.

John H. Phillips,
President

The by-laws frequently provide that special meetings of the board may be called by a certain number of the directors. This call is usually addressed as in the following form and handed to the secretary direct.

Form 58. Directors' Call for Special Meeting

Call for Special Meeting of Directors

We, the undersigned, Directors of the Westchester Brewing Company, hereby call a special meeting of the Directors of said Company, to be held in its office, No. 1575 St. Nicholas Ave., New York, on the 7th day of October, 1917, at 11 o'clock A.M., for the purpose of considering and acting upon a proposition to purchase the plant and equipment of the Harrison Brewery, and for the transaction of any and all business necessary in connection therewith, and we hereby instruct the Secretary of the Company to send out notices of said special meeting in accordance with the By-law requirements of this Company.

New York City,
October 1, 1917

Henry C. Carson
Frank H. Merrill
Samuel Frenkel

To Mr. John H. Hersey,
Secretary Westchester Brewing Co.

CHAPTER LXXII

NOTICES OF MEETINGS

Every person entitled to be present at a corporate meeting is also entitled to notice of such meeting. If the notice to be given is prescribed by the charter, by-laws, or statutes, this is always sufficient, but, if not so determined, "reasonable notice" is then necessary and this requires such notice as will under ordinary circumstances enable the parties notified to attend without being specially inconvenienced.

Notice of a special meeting must accord as to the time, place, and purposes thereof with the call by which the meeting is authorized. The authority under which it is issued should be stated in the notice.

Form 59. Notice of Special Meeting of Stockholders

HUDSON NAVIGATION COMPANY

NEW YORK CITY, New York,
September 1, 1917

Mr. ARTHUR C. MCCALL,
227 Broadway, New York.

DEAR SIR:

You are hereby notified that pursuant to the call of the President, a special meeting of the stockholders of the Hudson Navigation Company will be held in the office of the Company, No. 270 Broadway, New York, on the 15th day of September, 1917, at 10 o'clock A.M., for the purpose of considering and acting upon a proposition to sell the entire property and assets of the Company, and for the transaction of any and all business in connection therewith that may properly come before said meeting.

Yours very truly,
HENRY H. SHELDON,
Secretary

(For president's call, see Forms 47, 48.)

When notice of a special meeting is to be published, the following form is frequently used. The same form also serves as a notice to be sent by mail.

Form 60. Publication Notice of Special Meeting of Stockholders

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HUDSON NAVIGATION COMPANY
270 Broadway, New York

Notice is hereby given that a special meeting of the stockholders of the Hudson Navigation Company will be held in the office of the Company, No. 270 Broadway, New York City, on the 15th day of September, 1917, at 10 o'clock in the forenoon, for the purpose of considering and acting upon a proposition to sell the entire property and assets of the Company, and for the transaction of any and all business in connection therewith that may properly come before said meeting.

By order of the President.

New York City, N. Y.,
September 1, 1917

HENRY H. SHELDON,
Secretary

The following gives an excellent form of notice for a special meeting of stockholders.

Form 61. Publication Notice of Special Meeting of Stockholders

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WESTERN PACIFIC RAILROAD COMPANY

SPECIAL MEETING OF STOCKHOLDERS

120 Broadway, New York,
March 26, 1916

To the Stockholders of the
WESTERN PACIFIC RAILROAD COMPANY:

Notice is hereby given that a special meeting of the stockholders of Western Pacific Railroad Company has been called by the Board of Directors to convene at the office of the Company at Salt Lake City, in the State of Utah, on the 5th day of May, 1916, at 10 o'clock A.M., for the purpose of considering and acting upon the following propositions, viz.

(Purposes omitted.)

The books for the transfer of the stock (both preferred and common) will be closed for the purpose of the meeting, at 12 o'clock noon, on the 11th day of April, 1916, and will be reopened at 10 o'clock A.M. on the 6th day of May, 1916.

By order of the Board of Directors.

JOHN HAMILTON,
Secretary

Notice of the annual meeting must be sent out in accordance with the requirements of the by-laws.

Form 62. Notice of Annual Meeting

HARMON PUBLISHING COMPANY
765 Main St., Dover, Delaware

October 1, 1917.

Mr. FRANCIS H. JAMIESON,
336 Ocean Ave., Atlantic City, N. J.

DEAR SIR:

You are hereby notified that the annual meeting of the stockholders of the Harmon Publishing Company will be held at the office of the Company in Dover, Delaware, on Tuesday, October 13, 1917, at 10 o'clock A.M., for the elections of five Directors for the ensuing year and for the transaction of such other business as may come before the meeting.

The stock transfer books of the Company will be closed at 3 o'clock P.M., October 5, 1917, and remain closed until 10 o'clock A.M., October 14, 1917.

Respectfully,

JAMES H. HOWARD,
Secretary

Form 63. Notice of Annual Meeting (U. S. Steel Corp.)

UNITED STATES STEEL CORPORATION

NOTICE OF ANNUAL MEETING OF APRIL 16, 1917

Notice hereby is given that the Annual Meeting of the Stockholders of the United States Steel Corporation will be held at the principal office of the Corporation, at the Hudson Trust Company, No. 51 Newark Street, in the City of Hoboken, County of Hudson, New

Jersey, on Monday, the sixteenth day of April, 1917, at 12 o'clock noon, for the transaction of any and all business that may come before the meeting, including considering and voting upon the approval and ratification of all purchases, contracts, acts, proceedings, elections, and appointments by the Board of Directors or the Finance Committee since the Annual Meeting of the Stockholders on April 17, 1916; and all matters referred to in the Annual Report to Stockholders for the fiscal year ending December 31, 1916, and in the proceedings of the Board of Directors, which until the meeting will be open to examination by stockholders of record during business hours at the New York Office of the Corporation, 71 Broadway; the election of five Directors to hold office for three years; and the election of independent auditors to audit the books and accounts of the Corporation at the close of the fiscal year.

The stock transfer books will be closed at the close of business on Friday, the 16th day of March, 1917, and will be re-opened at 10 o'clock in the morning of Tuesday, April 2, 1917.

RICHARD TRIMBLE,
Secretary

Hoboken, New Jersey,
February 27, 1917.

As the stock of the Corporation should be represented as fully as possible at the annual meeting, Stockholders who do not expect to attend in person, and who wish to vote as therein indicated, may sign the attached proxy and return the same in the accompanying envelope addressed to United States Steel Corporation, Transfer Office, 71 Broadway, New York.

In view of the very considerable amount of detail necessary to prepare for this meeting, it is desired that a proxy shall be returned at as early a date as possible by every Stockholder.

A copy of the Annual Report will be mailed to each Stockholder of record under a separate cover and will be submitted at the meeting.

RICHARD TRIMBLE,
Secretary

This is an unusually long notice and few corporations will find it necessary to go into so much detail. It would seem better form to confine the notice proper to the time, place, and election of directors and then refer to the other matters set forth below.

In a number of states the statutes require the publication of the notice of the annual meeting. The following forms are suitable for this purpose. Form 62 may also be easily modified to serve as a publication notice.

Form 64. Publication Notice of Annual Meeting

HARMON PUBLISHING COMPANY

765 Main St., Dover, Delaware

October 1, 1917.

Notice is hereby given that the annual meeting of the stockholders of the Harmon Publishing Company will be held at the office of the Company at 765 Main St., Dover, Delaware, October 13, 1917, at 10 o'clock A.M., for the election of five Directors and for the transaction of such other business as may be brought before said meeting.

The stock transfer books of the Company will be closed at 3 o'clock P.M., October 5, 1917, and remain closed until 10 o'clock A.M., October 14, 1917.

JAMES H. HOWARD,
Secretary

Form 65. Publication Notice of Annual Meeting

NEW YORK LOAN AND IMPROVEMENT CO.

NEW YORK, June 12, 1917.

The Annual Meeting of the Stockholders of the New York Loan and Improvement Company, for the election of nine Directors, and two inspectors of election and transaction of such other business as may properly come before the meeting, will be held at the office of the company, No. 51 Wall Street, New York City, on Tuesday, July 16, 1917, at 12 o'clock noon. The polls will be open from 12 M to 1 P.M.

F. S. ROLLINS,
Secretary

Form 66. Publication Notice of Annual Meeting (U. P. R. R. Co.)

WESTERN PACIFIC RAILROAD COMPANY

ANNUAL MEETING

120 BROADWAY, New York,
August 13, 1916.

The Annual Meeting of the stockholders of Western Pacific Railroad Company will be held at the office of the Company in Salt Lake City, Utah, on Tuesday, October 15, 1917, at twelve o'clock noon, for the fol-

lowing purposes, viz.: (1) To elect fifteen Directors; (2) . . . .; and (3) To transact all such other business as may legally come before the meeting, including the approval and ratification of all action of the Board of Directors and of the Executive Committee since the last Annual Meeting of the stockholders of the Company.

For the purposes of the meeting the books for the transfer of stock, both preferred and common, will be closed at 3 o'clock P.M. on Monday, September 14, 1916, and will be reopened at 10 o'clock A.M. on Wednesday, October 14, 1916.

JOHN HAMILTON,
Secretary

Form 67. Notice of Special Meeting of Directors

HYDRO-CARBON STEEL COMPANY

134 West 23rd St., New York City

September 15, 1917.

Mr. WALTER H. SINCLAIR,
Montclair, New Jersey.

DEAR SIR:

You are hereby notified that pursuant to call of the President, a special meeting of the Board of Directors of this Company will be held in its office at 3 o'clock P.M. on the 18th day of September, 1917, to act upon a proposition to purchase the plant of the Scranton Foundry Company and to transact such other business in connection therewith as may be necessary or desirable.

Respectfully,
MILTON H. SANDERSON,
Secretary

This notice must be sent to every member of the board. The time, place, and purpose of the meeting must be stated, and, unless every member of the board is present and agrees thereto, no business may be transacted at the meeting save that so specified.

The following notice is the usual formal notice of the regular meeting of directors. If desired, a printed form could be used with blanks for the dates and addresses.

Form 68. Notice of Regular Meeting of Directors

HYDRO-CARBON STEEL COMPANY

134 West 23rd St., New York City

October 1, 1917.

Mr. Walter H. Sinclair,
Montclair, New Jersey.

Dear Sir:

You are hereby notified that the regular quarterly meeting of the Board of Directors of the Hydro-Carbon Steel Company will be held in the office of the Company, No. 134 West 23rd St., New York, on Tuesday, October 13, 1917, at 3 o'clock P.M.

Respectfully,

Milton H. Sanderson,
Secretary

It is but rarely that publication notices are used in assembling directors' meetings. Either of the foregoing notices might be readily modified, if desired, to serve as a publication notice. Consent meetings, from their nature, neither permit nor require any formal notice. (See § 309.)

CHAPTER LXXIII

FORMS OF PROXIES

A proxy is merely a special power of attorney and may convey any authority the maker desires up to the limit of his own.

The powers conferred by a proxy are limited strictly to those specified. Thus, a proxy to vote on a proposed amendment of the charter at a certain meeting would not authorize the holder to vote also upon a proposed amendment of the by-laws though considered at the same meeting.

The time for which a proxy runs is also governed strictly by the provisions of the instrument unless sooner terminated by statutory or by-law provisions, or by the death of the maker, or by the sale of his stock, or by his formal revocation filed with the secretary, or, for the meetings at which he appears, by the presence and participation thereat of the maker.[1] A proxy given for a particular meeting holds good for any meeting adjourned therefrom, whether so specified in the proxy or not.

"A proxy should be in writing, but it need not be in any particular form; it need not be acknowledged or proved, but it must be in such a shape as reasonably to satisfy the inspectors of election of its genuineness and validity."[2] To meet this requirement the proxy should be signed and sealed by the maker and be witnessed by at least one person, but does not ordinarily require acknowledgment. It may cover all or any part of the stock owned by an individual, and two

[1] Chapman v. Bates, N. J. Eq. 658 (1900); Commonwealth v. Patterson, 158 Pa. St. 476 (1893).
[2] 2 Cook on Corp., § 610.

or more proxies may be given by a single stockholder, each proxy covering a part of his holding.

A proxy may be revoked by the maker at any time even though by its terms the proxy is irrevocable. The only exception to this rule is where occasionally a proxy is coupled with an interest in the stock on which the proxy is given. The revocation of a proxy should be in writing and be filed with the secretary of the meeting. The mere presence of the owner of the stock at any meeting, with the express intention of voting his stock thereat, has the effect of revoking for that meeting all outstanding proxies given by him. If a proxy is issued while a prior proxy for the same stock is outstanding, a revocation of the first proxy should be incorporated in the second. Should this not be done, the more recent proxy will on presentation revoke the first, but the absence of formal revocation is a suspicious circumstance, liable to provoke inquiry and cause trouble.

Notices of the annual meetings of the larger corporations are usually accompanied by proxy forms, which stockholders unable to be present at the meeting in person are requested to sign and send in to the corporate officials. In this way a quorum is often secured when otherwise it would fail. The plan is sometimes utilized with much effect for the purpose of securing a majority for some measure favored by the directors of the company, or to secure the re-election of the present directors.

Proxies sent with notices of meetings sometimes name the parties to act, but are frequently sent out without, and are then usually returned signed in blank; i.e., while duly signed and witnessed, the name of the person who is to act as proxy is omitted. The name of the secretary or someone else present at the meeting is then inserted and the instrument so completed is legally effective.

Proxies signed in blank are usually employed in any

case where the name of the party to act has not been definitely decided upon or where it is immaterial. In this shape the proxy can be used by anyone into whose hands it may come. When once completed, however, by the insertion of the name of the party to act, it can be used only by the specified party, nor can this party authorize anyone else to vote the stock covered by the proxy unless the proxy itself distinctly confers upon him full rights of substitution.

Directors cannot give proxies authorizing others to represent and vote for them at directors' meetings. The directors occupy a position of trust and they cannot as individuals delegate the trust vested in them to others. This is a settled principle of law.

When the proxies are to be used they are filed with the secretary of the meeting. If the holder desires to retain his original proxy, he may, after exhibiting the original, file a certified copy with the secretary of the meeting.

Form 69. Proxy—Simple Form

PROXY

I hereby appoint George H. Brewer my proxy with full authority to vote for me and in my place at any and all stockholders' meetings of the Brewer Plow Company.

Witness my hand and seal this 7th day of October, 1917.

HAROLD J. MCCORMICK [L. S.]

Witnessed by
HENRY F. SIMMONS

This proxy is under most circumstances legally sufficient and the powers it conveys are broad. A more formal proxy is, however, desirable when important matters are to be considered. The proxy which follows is still simple as to form but more specific in its terms.

Form 70. Proxy—Unlimited

PROXY

I, the undersigned, do hereby constitute and appoint George J. McClelland my true and lawful attorney to represent me at any and all meetings of the stockholders of the Carney Falls Power Company, and for me and in my name and stead to vote thereat upon the stock standing in my name on the books of said Company at the times of said meetings, and I hereby grant my said attorney all the powers that I should myself possess if personally present thereat.

Witness my signature and seal this 15th day of August, 1917.

HAROLD B. MCCLELLAND [L. S.]

In the presence of
ALPHONSE H. DURET

At the expiration of the specified term the following proxy becomes null and void without formal revocation or other action on the part of the maker.

Form 71. Proxy—Time Limited

PROXY

I, the undersigned, do hereby constitute and appoint Henry M. Williams my true and lawful attorney to represent me at all meetings of the stockholders of the Carney Falls Power Company held on or prior to the 15th day of June, 1917, and do hereby authorize and empower him for me and in my name and stead to vote at such meetings upon the stock now standing in my name on the books of said Company, and I hereby grant my said attorney all the power at said meetings that I should myself possess if personally present thereat.

Witness my signature and seal this 1st day of August, 1916.

SAMUEL B. FREMONT [L. S.]

In the presence of
J. J. MASTERSON

It should be noted that the wording of the foregoing proxy authorizes the appointee to vote only upon the stock "now standing in my name." Should the maker acquire additional stock of the company after the date of this proxy

but during its life, such additional stock is not covered by the proxy. In this the proxy differs from the proxy of Form 70 which covers all stock owned by the maker "at the times of said meetings."

Form 72. Proxy—Particular Meeting

PROXY

KNOW ALL MEN BY THESE PRESENTS:

That I, the undersigned, do hereby constitute and appoint Kenneth J. Johnson my true and lawful attorney with full powers of substitution and revocation, to represent me at the special meeting of stockholders of the Graham Navigation Company, to be held on the 19th day of October, 1917, at 3 o'clock P.M., and do hereby authorize and empower him to vote at said meeting and at any adjournment thereof, for me and in my name and stead, upon the stock then standing in my name on the books of said Company, and I hereby grant my said attorney all the powers that I should possess if personally present at said meeting.

Witness my signature and seal this 1st day of October, 1917.

MELVER M. MCKIM [L. S.]

In the presence of
HENRY P. SWENTON

Outside its limitation as to time, the preceding proxy is broad. It not only covers all stock held in the name of the maker at the time of meeting and empowers the appointee to act as fully and with the same authority as the owner might himself, but also empowers him to give and revoke proxies conveying similar voting powers to others. If it is not desired to convey these latter powers, the words "with full power of substitution and revocation" should be omitted.

If all the stock covered by a proxy is disposed of before the date of meeting, such proxy is thereby nullified. If part of the stock is sold, the proxy still holds for the remaining stock. If a proxy specifies the number of shares of stock to be voted upon, such proxy is good for the number of shares standing in the maker's name up to the specified number.

Form 73. Proxy—Limited as to Stock

PROXY

I, the undersigned, do hereby nominate and appoint John H. McCracken my true and lawful attorney, for me and in my name, place, and stead to vote at all stockholders' meetings of the Fowler Watch Company upon Twenty-five Shares of the stock of said Company standing in my name, and I hereby grant my said attorney all the powers as to said Twenty-five Shares of stock that I would myself possess if personally present at such meetings.

Witness my signature and seal this 10th day of October, 1917.

FRANCIS P. STERLING

In the presence of
HARRY H. FRENCH

The preceding form may be used when but a portion of the stock owned by a stockholder is to be represented by his proxy. A single stockholder may give several such proxies to cover his entire holding of stock, the object being to admit several representatives to the proceedings of the meeting.

The preceding proxy does not convey any greater or more complete powers than the shorter forms heretofore considered, but is more specific and conventional and therefore preferable when matters of importance are to be considered and acted upon.

Form 74. Proxy—Annual Meeting—Formal

PROXY

KNOW ALL MEN BY THESE PRESENTS:

That, we, the undersigned, stockholders of the Carney Falls Power Company, do hereby constitute and appoint J. Adam McCall our true and lawful attorney with full power of substitution and revocation, for us and in our names, place, and stead to vote upon the stock then standing in our respective names upon the books of said Company, at the annual meeting of the stockholders thereof to be held in the office of the Company, 425 Fifth Ave., New York City, January 15, 1917, at 10 o'clock in the fore-

noon, and at any meeting postponed or adjourned therefrom, hereby granting to our said attorney full power and authority to act for us and in our names and stead to vote thereat upon our said stock in the election of directors and in the transaction of such other business as may be brought before the said meeting, all as fully as we might or could do if personally present, and we hereby ratify and confirm all that our said attorney or his substitute shall lawfully do at such meeting in our names, place and stead.

IN WITNESS WHEREOF, we have hereunto affixed our respective signatures and seals this 2nd day of November, 1916.

S. S. FOLSOM [L. S.]
HENRY M. CLEVELAND [L. S.]
J. B. MCLAIN [L. S.]
SARGENT MCLAIN [L. S.]

In the presence of
WILLIAM J. HAMMOND
as to S. S. Folsom
and Henry M. Cleveland
JERRY T. MCALLISTER
as to J. B. McLain
and Sargent McLain

If the corporate stock is held in the name of the owner corporation, the proxy might be given under the corporate name as in the following general form.

Form 75. Corporate Proxy

PROXY

KNOW ALL MEN BY THESE PRESENTS:

That the Steel Company of the Republic, a corporation organized under the laws of the State of Pennsylvania, owning and holding Five Hundred Shares of the Capital Stock of the Howard Welding Company of New York City, does hereby constitute and appoint Frederick W. Morton of New York City its true and lawful attorney to attend the annual meeting of the aforesaid Howard Welding Company to be held in its office, No. 22 Broad St., New York, on October 10, 1917, at 10 o'clock in the forenoon, and thereat for this Company and in its name, place, and stead to vote upon the said Five Hundred Shares of stock, and to do all such other things competent to a stockholder of said Howard Welding Company, as may in his judgment be necessary or advantageous for the interests of this Company, and to that end the said Steel Company of the Republic does hereby grant to its said attorney for said meeting, and for any meetings adjourned therefrom, any and all powers belonging to or pertaining to this Company as a stockholder of the aforesaid Howard

Welding Company, hereby ratifying and confirming all that its said attorney may lawfully do at said meeting in its name, place and stead.

In Witness Whereof, the President and Secretary of the said Steel Company of the Republic, duly authorized thereto, have hereunto affixed the signature and seal of their said Company, all being done in the City of Philadelphia, Pennsylvania, on this 3rd day of October, 1917.

Steel Company of the Republic,
By John H. Sherman,
President

{ corporate seal }

Attest seal:
William M. McDonald,
Secretary

In some states the statutes empower the corporate officials to vote the stock of other corporations held by their corporation. In such case no proxy is necessary, but a certification that the official representing the company is its official, properly representing the company, is required.

Form 76. Revocation of Proxy

Revocation of Proxy

Know All Men by These Presents:

That I, the undersigned, do hereby revoke and annul any and all proxies or powers of attorney heretofore given by me, authorizing or empowering any person or persons to represent me, or vote in my name and stead or act for me in any way whatsoever at any meeting or meetings of the stockholders of the Carney Falls Power Company.

Witness my signature and seal this 10th day of October, 1917.

Daniel H. Ronalds [L. S.]

In the presence of
John H. Dunn

The foregoing revocation of outstanding proxies is sweeping in its terms. If some particular proxy is to be excepted from the general revocation, such proxy may be specifically reserved, or otherwise the revocation may itself be limited by its terms to the one or more proxies to be revoked, and any other outstanding proxies are not affected.

CHAPTER LXXIV

MOTIONS AND RESOLUTIONS

In the proceedings of corporate meetings, whether o stockholders or directors, anything obviously proper and o no great importance may be merely directed by the presiden and, in the absence of objection, this is held to be the actio of the meeting. Matters of more importance are sometime acted upon in this same way, but usually, and preferably action is taken by means of either a motion or a resolution.

There is no distinct line of demarcation between thes two. They differ as to form but both are expressions o the decisions of the meeting and are of the same legal force The motion is the simpler in form, and, though there i no well-established rule, is usually employed for matters o minor importance; while resolutions, which are formal an usually go further into their subject matter, are employe for such important corporate actions as require a more com plete statement and record.

Motions

Motions are not as a rule submitted in writing. Th secretary must therefore exercise every care to get the sens of what is intended. If he is in doubt in any case as t whether he has understood the motion, or if its subject matte is of unusual importance, or if it is desirable that the exa wording be preserved, the presiding officer should reque the maker of the motion to repeat it, or, better, to reduce to writing. When this is done, the motion is turned over t

the secretary, and, if carried, is incorporated in his minutes in the exact form submitted.

The following forms show motions as they appear in the secretary's minutes. The form is the same for either stockholders' or directors' minutes.

Form 77. Motion to Receive President's Report

On motion duly seconded and unanimously carried, the President's report as read was duly received and filed.

Form 78. Motion Instructing Secretary to Cast Vote

There being no other nominations, the Secretary was instructed by motion unanimously carried, to cast the single ballot of the meeting for the five candidates for Directors already named.

Form 79. Motion Instructing Secretary to Cast Vote—Formal

On motion unanimously carried, the Secretary was instructed to cast the single ballot of the meeting as follows:

For President .....John H. McNeil
" Vice-President .....Samuel French
" Secretary ..... .Harry McGill
" Treasurer .....Joseph F. Macklin

An amendment to the by-laws is usually acted upon by means of a resolution. In the following instance, as the amendment is of minor importance, it is decided by motion.

Form 80. Motion to Amend By-Laws

By motion unanimously carried, Section 1 of Article II of the By-Laws was amended by changing the hour for the assembling of the annual meeting of the Company from 12 o'clock noon to 3 o'clock P.M.

Form 81. Motion to Pay Bills

Upon motion duly seconded and unanimously carried, the Treasurer was instructed to pay the account of the Meyer Contracting Company for One Hundred and Thirty-Five Dollars, due for repairs on roof of the Franklin Mill as per statement submitted.

Usually the secretary uses his discretion as to recording the names of the parties making and seconding motions. They are not essential in the case of routine motions, motions covering matters of minor importance, or motions unanimously carried. Under other circumstances the name of the party making and also the party seconding a motion should be recorded. The vote on important motions when there is opposition, is sometimes recorded as well.

Form 82. Motion to Employ General Manager

Mr. Henry Sheldon moved that James J. McLain be employed as General Manager of the Company for a term of two years from date, at the annual salary of Fifteen Hundred Dollars payable in monthly instalments. The motion was seconded by Mr. Charles H. Corbett and carried; Messrs. Sheldon, McLemore, Corbett, and Johnson voting in the affirmative, and Messrs. Franklin, Hereford, and Trask voting in the negative.

A motion in writing should appear on the minutes in the exact form submitted, as in the following example, and should be introduced by an explanatory statement, as "The following motion offered by Mr. Wilson was duly seconded and carried by unanimous vote."

Form 83. Motion to Appoint an Investigating Committee

Moved, that the President be authorized and directed to appoint a committee consisting of three directors of this Company, to investigate the books and accounts of the Treasurer for the past three years, such committee to have full access to the Company's financial records and to have authority to employ an Auditor to conduct the technical work of their examination, the compensation of said Auditor not to exceed the sum of Three Hundred Dollars.

Resolutions

Resolutions should be submitted in writing. They are entered in the minutes prefaced with such explanatory remarks as the conditions require or the secretary thinks desirable, as "Upon motion duly made and seconded the following resolution was unanimously adopted," or "The following resolution was presented by Mr. Cassellton, seconded by Mr. Edwards and adopted, Messrs. Cassellton, Edwards, Brice, and McNeil voting in the affirmative, and Messrs. Mack and Adams voting in the negative." A preamble is always admissible but, if the subject matter of a resolution is simple, is not necessary.

There is no difference in form between a resolution adopted by the stockholders and one adopted by the directors.

Form 84. Stockholders' Resolution for Sale of Entire Assets

Whereas, William F. Gaynor and James G. Reilly as Trustees before organization for the New Hampshire Granite Company, have made a proposition to purchase the entire plant and business of this Company as a going concern, including all assets and liabilities, save cash in bank and on hand, for Ten Thousand Dollars ($10,000) in cash and Forty Thousand Dollars ($40,000) par value of the stock of said New Hampshire Granite Company:

Now, Therefore, Be It Resolved, That the said proposition be hereby approved, and that the Directors of this Company be and hereby are fully authorized, instructed, and empowered to accept the said proposition for the sale of its entire property and business, and to do all things necessary to carry such acceptance into effect according to the terms of said proposition.

(For corresponding directors' resolution, see Form 102.)

Form 85. Stockholders' Resolution Authorizing Consolidation

Whereas, A consolidation of the Midvale Foundry Company and the Midvale Steel Company under the name of the New Jersey Foundry Company, has been proposed, on terms and conditions set forth in an agreement entered into on the 17th day of November, 1917, between the

Directors of said corporations and heretofore submitted to the stockholders of this Company; and

WHEREAS, Said proposed consolidation meets with the approval of the stockholders of this corporation:

NOW, THEREFORE, BE IT RESOLVED, That the Board of Directors of this Company be and hereby is fully authorized, empowered, and instructed to take all such steps as may be necessary or desirable to carry said consolidation into effect in accordance with the terms of said agreement between the Directors of the two aforementioned corporations.

Form 86. Stockholders' Resolution to Amend By-Laws

WHEREAS, Section 4 of Article IV of the By-laws of this Company reads and provides in part as follows:

> "The Treasurer shall have the custody of all moneys and securities of the Company and shall keep regular books of account and balance the same each month."

AND WHEREAS, It seems to the stockholders of the Company that the interest of the Company will be better conserved if its moneys and securities are placed in the custody of its President:

NOW, THEREFORE, BE IT RESOLVED, That said Section 4 of Article IV of said By-laws be and hereby is amended as to the part above set forth to read and provide as follows:

> "The Treasurer shall keep regular books of account and balance the same each month."

and that Section 2 of Article IV of said By-laws be amended to read and provide as follows:

> "The President shall preside at all meetings of stockholders and directors; shall have general supervision of the affairs of the Company; shall have the custody of all its moneys and securities; shall sign or countersign, etc."

The following is a simple form of resolution authorizing the treasurer to open a bank account. It should be certified before submission to the bank. (See Form 170.)

Form 87. Directors' Resolution to Open Bank Account

RESOLVED, That the Treasurer be and hereby is authorized and instructed to open an account for the Company with the Seaboard National Bank of New York City and to deposit therein all funds of the Company coming into his possession, such account to be in the name of the Company and funds deposited therein to be withdrawn only by check signed by the Treasurer and countersigned by the President.

In some cases the designated bank requires a certified

transcript of any by-laws giving the duties and powers of the officers in relation to the funds. Such by-laws may be certified separately (see Form 175), or may be included in the resolution, as in the following example.

Form 88. Directors' Resolution Designating Depositary

WHEREAS, Section 3, Article VII of the By-laws of the Standard Milling Company is as follows:

"*The Moneys of the Company* shall be deposited in the name of the Company in such bank or banks as the Board of Directors shall designate, and shall be drawn out only by checks signed by the Treasurer and countersigned by the President, unless otherwise provided by resolution of the Board."

NOW, THEREFORE, In pursuance of said By-law, the Board of Directors of the Standard Milling Company hereby designates the Sherman Trust Company of New York City as a depositary of this Company, and authorizes and instructs the Treasurer to open an account with said Trust Company in the name of the Company, and to deposit therein all funds of the Company coming into his custody, save as may be otherwise directed by the Board, said funds to be withdrawn only by check signed by the Treasurer and countersigned by the President.

(For certification of above resolution, see Form 171.)

In many cases the banks have their own forms of resolution for designation of the corporate depositary, which they supply on request and which they naturally prefer should be used. As a rule these forms are good, though occasionally the latitude and power they confer upon the officers of the corporation are somewhat excessive. If this is the case, the resolution may be modified to meet the requirements of the particular corporation while still preserving its general form. The form of resolution which follows is used by some of the large New York banks.

Form 89. Directors' Resolution Designating Bank

RESOLVED, That the Sherman National Bank of the City of New York be and the same is hereby designated as the depositary of the funds of the American Textile Company, and that an account be opened with such Bank in the name of said Company, and that George H. Wahrman, the

Treasurer of said Company, so long as he shall be Treasurer thereof is hereby authorized to sign or indorse any instrument for or on behalf of said Company and have the same placed to the credit of said account, and also from time to time to withdraw or transfer by check or draft or other instrument signed by him and countersigned by Henry G. Maxim, President of the said American Textile Company, or any successor President of said Company, any amount or parts thereof which may from time to time be to the credit of said account; and

RESOLVED FURTHER, That the respective powers and the authority conveyed by this present resolution shall pass to any duly elected and qualified successor Treasurer or President of the said American Textile Company without further action of this Board, and as fully and to the same extent as if said successor officer were named herein.

Under this resolution, if a new treasurer or president is elected, nothing is necessary save for the election and acceptance of the new official to be certified to the bank by the secretary of the company. (See Forms 173, 174.)

Form 90. Directors' Resolution Authorizing Issue of Stock

RESOLVED, That the President and Treasurer be and hereby are authorized and directed to issue certificates of the full-paid Capital Stock of this Company to the aggregate amount of Ten Thousand Dollars ($10,000), and to deliver the same to the written order of Robert H. Stuart, Fiscal Agent for the Company, against payment into the treasury of the Company of the full par value thereof.

Form 91. Directors' Resolution Authorizing Contract

RESOLVED, That the President and Secretary be and hereby are authorized and instructed to enter into a contract with the Wilbur Collins Construction Company on behalf of this corporation, for the erection of a power house, the construction of said power house to be in accordance with the plans and specifications on file in the office of this corporation and the cost thereof not to exceed Twenty-Five Thousand Dollars ($25,000), payment thereof to be made as set forth in the written proposition heretofore submitted to this corporation by the said Wilbur Collins Construction Company.

Form 92. Directors' Resolution Declaring Dividend

RESOLVED, That the sum of Ten Thousand Dollars ($10,000) be and hereby is appropriated and set aside from the surplus profits of this Com-

pany for the payment of the regular Two Per Cent (2%) quarterly dividend upon its outstanding stock, said dividend to be due and payable on the 20th day of October, 1917, to stockholders of record as shown by the books of the Company at the close of business on the 15th day of October, 1917.

RESOLVED FURTHER, That the Treasurer of this Company be hereby authorized and instructed to give due notice of such dividend and to pay the same when due.

Form 93. Directors' Resolution Declaring Dividend—Preferred Stock

RESOLVED, That the semiannual dividend of Three Per cent (3%) upon the outstanding Preferred Stock of the Company be and hereby is declared from surplus profits, said dividend to be paid on the 10th day of October, 1917, and to be payable to stockholders who appear of record on the 1st day of October, 1917, at 3 o'clock P. M., and that the Treasurer of this Company be hereby instructed and fully authorized to give due notice of such dividend and to pay the same on the date set forth.

Form 94. Directors' Resolution Declaring Dividend—Preferred and Common Stock

WHEREAS, The surplus profits of this Company now exceed the sum of Ten Thousand Dollars ($10,000) required by the By-laws of this Company to be held as a reserve, and such excess is now available for payment of dividends:

NOW, THEREFORE, BE IT RESOLVED, That a dividend of Five Per Cent (5%) be and hereby is declared upon the outstanding Preferred Stock of this Company, and a dividend of Three Per Cent (3%) on the outstanding Common Stock of this Company, said dividends to be payable from said excess surplus profits of the Company on the 5th day of November, 1917, to stockholders appearing of record at 3 o'clock P.M., on this 15th day of October, 1917; and that the Treasurer of this company be hereby fully authorized and instructed to give proper notice of said dividends, to pay the same when due, and to take all other necessary steps to carry out the intent of the present resolution.

Form 95. Directors' Resolution Appointing Managing Director

RESOLVED, That Mr. William S. Weston be hereby appointed Managing Director of this Company and be given the general supervision and management of the Company's affairs and business, with such other powers and duties as the Board of Directors may from time to time confer upon

him; the annual salary of said Managing Director to be Twenty-Four Hundred Dollars ($2400), payable in monthly instalments of Two Hundred Dollars ($200) each.

Form 96. Directors' Resolution Calling Special Meeting of Stockholders

WHEREAS, The authorized Capital Stock of this corporation is One Hundred Thousand Dollars ($100,000) divided into One Thousand (1,000) Shares of Common Stock of the par value of One Hundred Dollars ($100) each, of which Five Hundred (500) Shares are issued and Five Hundred (500) Shares are unissued; and

WHEREAS, It is deemed advisable by this Board that said Capital Stock shall be so classified and divided into Common and Preferred Stock that the said Five Hundred (500) Shares of outstanding stock shall be and remain Common Stock, but that the said Five Hundred (500) Shares of unissued stock shall become and be non-voting Preferred Stock, entitled to receive a cumulative, preferred dividend of Six Per Cent (6%) per annum and redeemable at its par value at the option of the Company at any time after ten years from the date of its issue, and upon the liquidation of the Company to be redeemed if outstanding, at its full face value from the assets before any payment is made upon the Common Stock but not to participate further in said assets:

NOW, THEREFORE, BE IT RESOLVED, That a special meeting of the stockholders of this Company be and hereby is called to meet in the office of the Company on the 10th day of October, 1917, at 10 o'clock in the forenoon, for the purpose of considering and acting upon the proposed classification of the stock of this Company as afore set forth, and that the Secretary of the Company be hereby authorized and instructed to send out notices of said meeting as required by law and by the By-laws of this Company.

This resolution conforms to the requirements of the New York laws, classification of the company's stock requiring authorization by the stockholders.

Form 97. Directors' Resolution to Sell Bonds

RESOLVED, That Howell & Wilkins of New York City be and hereby are authorized and empowered to sell bonds of this Company to the aggregate face value of One Hundred Thousand Dollars ($100,000), and to deduct from the price received therefor a commission of Two Per Cent (2%) provided, however, that the net price received by this Company for each One Thousand Dollar ($1,000) Bond shall not be less than Nine Hundred and Fifty Dollars ($950); and

RESOLVED, FURTHER, That the Treasurer of this Company be and here-

by is authorized and instructed to deliver said bonds in whole or in part on the written order of the said Howell & Wilkins, and to receive and receipt for all amounts paid by them into the treasury of the Company on account of sales of said bonds.

Form 98. Directors' Resolution to Purchase Property

Resolved, That the President and Treasurer of the Company be and hereby are authorized and instructed to consummate the purchase of the West Valley Marl Beds in accordance with the terms of the option under which said Beds are now held, and that they be further authorized and empowered to do all such things for and on behalf of the company and in its name as may be necessary thereto.

Form 99. Directors' Resolution for Settlement of Claim

Resolved, That the President and Secretary of this Company, acting with its Counsel, be hereby instructed to use their best efforts to arrive at some favorable settlement with the employees of this Company injured in the recent accident, and that said officers be hereby fully authorized and empowered to accept any settlement deemed by them satisfactory and approved by the Counsel of the Company, provided that the total payments involved therein shall not exceed the sum of Twenty-five Hundred Dollars ($2500).

Form 100. Directors' Resolution Ratifying Sale of Property

Whereas, The President and Treasurer of this Company have heretofore on the 21st day of July, 1917, sold and disposed of the machinery, tools, and other apparatus belonging to this Company and then in the premises at 235 Main St., Newark, New Jersey, the amount realized from such sale—Two Thousand, Seven Hundred and Fifty Dollars ($2,750)—having been duly paid into the treasury of this Company; and

Whereas, Said sale was made without authorization from this Board, owing to the absence from the city of a majority of its members; and

Whereas, In the opinion of the Board such sale was for the best interests of the Company, and the action of said officers in consummating the same therefore meets with its approval:

Now, Therefore, Be It Resolved, That the action of the said officers of this Company in selling and disposing of the aforementioned property as aforesaid be and hereby is ratified, approved, and confirmed, and that said action be accepted as the action of the Company, and the assignments thereof be ratified, confirmed, and accepted as the duly executed assignments of this Company, of the same force and effect as if entered into under direct authorization of this Board.

Form 101. Directors' Resolution Removing Officer

WHEREAS, In the opinion of this Board the interests of the Company do not permit the continuance, in his present official position, of its President, John Farraday; and

WHEREAS, The said John Farraday has refused to resign although requested thereto by members of this Board duly authorized thereunto:

NOW, THEREFORE, BE IT RESOLVED, That exercising its statutory power the Board of Directors of the Manly Electric Corporation does hereby remove the said John Farraday from his official position as President of this Company, and declares said office vacant and said John Farraday no longer authorized to act on its behalf in any capacity; and

RESOLVED FURTHER, That the Secretary of the Company be and hereby is instructed to notify at once the said John Farraday of his removal from the presidency of this Company, and to give such other proper and public notice of said removal as may in his judgment be necessary to protect the interests of the Company.

Form 102. Directors' Resolution for Sale of Entire Assets

WHEREAS, A proposition has been made by the Trustees of the New Hampshire Granite Company to purchase the entire property and business of this Company for Ten Thousand Dollars ($10,000) in cash and Forty Thousand Dollars ($40,000) in stock of the said proposed corporation as set forth in their written proposition heretofore ordered to be spread upon the minutes of this meeting; and

WHEREAS, The stockholders of this Company in duly assembled meeting at which all the voting stock of the Company was represented in person or by proxy, did by resolution unanimously carried, approve said sale and authorize and instruct this Board to accept said proposition:

NOW, THEREFORE, BE IT RESOLVED, That the said proposition be and the same is hereby accepted by this Company on the terms set forth in said written proposition as entered upon the minutes of this meeting, and the President and Secretary of the Company are hereby empowered and instructed to execute all proper instruments to carry such acceptance into effect, and on behalf of this Company to receive the said Ten Thousand Dollars ($10,000) in cash and Forty Thousand Dollars ($40,000) in stock of the said New Hampshire Granite Company, and to do all such other things in connection with such sale and the said transfer of property as may be found necessary for its proper consummation.

(For corresponding stockholders' resolution, see Form 84.)

CHAPTER LXXV

INCIDENTAL FORMS

The secretary will find a list of stockholders, giving the stock held by each and arranged as in the following form, of much convenience for use at stockholders' meetings. This does not take the place of the statutory list required in some states, but is merely for use in calling the roll or noting those present and absent, and preserving in compact form a record of the results.

Form 103. Secretary's List of Stockholders

INDUSTRIAL SUPPLY COMPANY

List of Stockholders
October 10, 1917

Name	Shares Owned	Not Present	Present in Person	Present by Proxy	Name of Proxy
Adrian, Henry F.	100	..	100	..	
Ahrens, Sam'l T.	50	50	..	..	
Allison, Daniel H.	75	..	..	75	George T. Foster
Barry, John J.	85	..	85	..	
Belmont, Maurice	25	..	25	..	
Colville, Frederick	100	..	100	..	
Daniels, E. F.	100	50	..	50	Harry H. Winters
Greenwald, Martin	80	..	..	80	William Greenwald
Hughes, Cora H.	150	..	150	..	
Lawrence, Edw.	25	25	..	..	
McCabe, Albert	50	..	..	50	W. B. Wells
Mullins, Chas. D.	35	..	35	..	
Price, Harvey	200	..	200	..	
Rollins, James H.	50	..	..	50	Henry Siebert
Shanley, J. J.	25	25	..	..	
Sherman, B. L.	150	..	150	..	
Wiley, Edwin H.	100	..	..	100	Harry T. French
Zimmer, Henry T.	100	..	100	..	
	1,500	150	945	405	

The list as shown is after the secretary's notations have been made. The data of the first two columns are taken from the stock books of the company before the time of the meeting. If a stockholder is not represented at the meeting, a check mark, or, better, the number of his shares, is entered in the third column. If present in person, the number of shares owned is entered in the fourth column. If represented by a proxy, the number of his shares is entered in the fifth column, and the name of the person holding the proxy in the last column.

It will be noted that in the foregoing list, a portion of the holding of one stockholder is entered in the column "Not Present" and a portion is entered in the column "Present by Proxy." This shows that the party gave a proxy for a portion of his stock and that the person to whom this was given was present, while the remaining stock was not represented.

The list, when the secretary's notations are finished, gives a complete record of the attendance at the meeting. The combined footing of columns four and five give the number of shares represented, which added to the footing of column three will give the total stock outstanding.

At the annual meeting routine work is apt to be gone through with some rapidity and the secretary does not always have time for its proper record unless provision is made therefor prior to the meeting. For this purpose outline minutes are frequently prepared.

These outline minutes are best prepared on sheets of loose paper with ample room between the items for the interpolation of any comments or additional matter. They are merely intended to afford memoranda from which the secretary will later write out the complete minutes. If, through unexpected changes or omissions any portion of the outline minutes cannot be used, the secretary has merely to draw his pencil through the part superseded.

Form 104. Outline Minutes for Annual Meeting

INDUSTRIAL SUPPLY COMPANY
OF NEW YORK

MINUTES OF ANNUAL MEETING
Held October 10, 1917

Meeting called to order at..... A.M., by..... who presided over meeting. Officiating Secretary.....
Present at meeting in person.....Shares. By Proxy.....Shares. Total.....Shares. (See Form 103 for this data.) Necessary for quorum, 751 Shares.
Copy of notice of meeting submitted with secretary's certificate of due service attached. Ordered spread upon minutes.
Minutes of previous meeting read and.....
Annual Reports:
President's
Treasurer's
Special
Election of Directors. Nominated:
....
....
.....
Inspectors of Election:
.....
.....
Results: (*To be taken from inspector's certificate of election; see Forms* 33, 106.)
New business:

In some states the statutes require that the election of directors must be conducted by inspectors. Elsewhere they or similar officers designated as tellers, are employed as a matter of convenience.

Usually inspectors are not sworn, but in some states this is required by the statutes or is a matter of custom. The oaths and certificates of inspectors of election in the general form employed in New York follow. They may be easily modified to meet any statutory requirements of other states. (For New Jersey form see Form 33.)

Form 105. Oath of Inspectors of Election—New York

OATH OF INSPECTORS OF ELECTION

STATE OF NEW YORK }
COUNTY OF NEW YORK } *ss.*:

We, the undersigned, duly appointed to act as Inspectors of Election at the annual meeting of the stockholders of the Hudson River Navigation Company, to be held in the office of the Company, No. 72 Broadway, New York, on the 2nd day of November, 1917, being severally duly sworn, depose and say and each for himself deposes and says that he will faithfully execute the duties of Inspector of Election at such meeting with strict impartiality and according to the best of his ability.

FRANK H. ASTOR
DAVID J. MCKANE

Severally sworn to before me this
2nd day of November, 1917.

ALLEN T. BAUVELT,
Notary Public in and for
New York County

{ NOTARIAL SEAL }

The oath of the inspectors of election and their certificate as to the election results—as given in the form which follows—are usually written, as a matter of convenience, on one sheet of paper, the oath preceding the certificate.

Form 106. Certificate of Inspectors of Election—New York

CERTIFICATE OF INSPECTORS OF ELECTION

We, the undersigned duly appointed Inspectors of Election of the Hudson River Navigation Company of New York City, New York, do hereby certify that at the regular annual meeting of said corporation, held in the office of the Company, No. 72 Broadway, New York City, on the 2nd day of November, 1917, a quorum being present, we being first duly sworn by oath hereunto annexed, did conduct the election for directors of said corporation and that the result of the vote taken thereat was the election by the plurality vote set opposite their respective names, of the following directors:

NAMES	VOTES RECEIVED
Charles E. Shepherd	2,135
Frank J. Platt	2,000
Harry P. Tucker	1,970
Edward T. Bowles	1,875

Henry P. Moody	1,825
George McDonald	1,825
Albert T. Calkins	1,800

IN TESTIMONY WHEREOF, we have executed this certificate this 2nd day of November, 1917.

FRANK H. ASTOR
DAVID J. MCKANE

Form 107. Acknowledgment of Inspectors' Certificate

STATE OF NEW YORK }
County of New York } *ss.:*

On this 2nd day of November, 1917, before me personally came Frank H. Astor and David J. McKane, to me known to be the persons described in and who executed the foregoing certificate and severally acknowledged that they executed the same for the use and purposes therein set forth.

{ NOTARIAL SEAL }

ALLEN T. BAUVELT,
Notary Public in and for
New York County

In New York the inspectors' oath and certificate must be filed in the county clerk's office. In New Jersey they are merely handed the secretary to be filed among the company's archives.

When not required by statute, the formality of swearing inspectors is usually dispensed with. An inspectors' report is, however, a convenient method of entering the results of the election upon the minutes, and the written report is therefore desirable. Its form under such circumstances might be as follows:

Form 108. Certificate of Inspectors of Election—General

CERTIFICATE OF INSPECTORS OF ELECTION

We, the undersigned, duly appointed Inspectors of Election of the Hamilton Machine Company of Philadelphia, Pennsylvania, to conduct the election of directors of said Company held this 14th day of Novem-

ber, 1917, at 3 o'clock P.M., in the office of the Company, No. 15 Chestnut St., Philadelphia, Pa., do hereby certify and report that said election was conducted by us in due and proper form, and that the result of the vote taken thereat by ballot was the election by the plurality vote set opposite their respective names of the following directors:

NAMES	VOTES RECEIVED
E. L. Lambert	200
John C. Robinson	200
Walter S. Hall	200
William H. Sloane	200
Alvah H. Marshall	200

IN WITNESS WHEREOF, we hereunto affix our respective signatures this 14th day of November, 1917.

ARTHUR T. NEWMAN
GEORGE HAYWOOD

A simple form of ballot for the annual meeting is as shown below. This is prepared before the time of the meeting, complete—when the candidates' names are known in advance—save as to signature and the number of shares voted.

Form 109. Ballot at Annual Meeting

MAXIM WATCH COMPANY

BALLOT

ANNUAL MEETING, NOVEMBER 5, 1917

I, the undersigned, hereby vote 125 shares of stock for the following named persons to serve as Directors for the ensuing year:

John H. Brown
Howard McCall
Marvin H. Smith
Frank T. Jones
Fowler McVeigh

Signature,

HAROLD MCKAIN,
Proxy for Samuel H. Hilton

Where a more formal ballot is desired the following will serve:

Form 110. Ballot at Annual Meeting—Formal

UNITED STATES POTTERIES

BALLOT

SIXTEENTH ANNUAL MEETING, APRIL 20, 1917.

The undersigned votes the number of shares noted in the subscription hereto as follows:

1. In favor of approving and ratifying all purchases, contracts, acts, proceedings, elections, and appointments by the Board of Directors or the Finance Committee, since the fifteenth annual meeting of the stockholders of the Corporation on April 15, 1916, as set forth in the minutes of the Board of Directors, or of the Finance Committee, or in the Fifteenth Annual Report.

2. For the following named persons, as Directors for the three years ending in 1920:

3. For the firm of Price, Waterhouse & Co., as independent auditors, to audit the books and accounts of the Corporation at the close of the fiscal year ending December 31, 1917.

NAME		NUMBER OF SHARES	
		PREFERRED	COMMON
	in person		
.....		.....	.....
	proxy for		

CHAPTER LXXVI

MINUTES OF CORPORATE MEETINGS

The general form in which minutes are kept is a matter of custom. The details are determined by the secretary of the particular company. The headings should, however, always be sufficiently full and explicit to show at a glance whether the meeting is of stockholders or directors and whether it is a regular, special, or adjourned meeting. The date of the particular meeting, though always stated in the body of the minutes, should also appear in the heading as a matter of convenience.

The name of the corporation is frequently brought in at the head of every set of minutes. When this is not done the minute book itself should be very plainly stamped or marked with the name of the company, which should also appear on the title page of the book and again at the top of the first written page of minutes.

Stockholders' Meetings

Form 111. **Minutes of Annual Meeting of Stockholders**

MIDVALE FOUNDRY COMPANY
of
New Jersey

Minutes of Regular Meeting of Stockholders
Held November 2, 1917

The stockholders of the Midvale Foundry Company met in annual meeting in the office of the Company at Midvale, New Jersey, at 10 o'clock in the forenoon, November 2, 1917.

The meeting was called to order and presided over by Mr. Frederick H. Colgate, President of the Company. The Secretary of the Company, Mr. W. A. Thompson, acted as Secretary of the meeting.

The Secretary after noting the stockholders present, reported that out of a total of 5,000 shares of stock outstanding and entitled to vote at the meeting, 4,900 shares were represented at the meeting; 3,500 shares in person and 1,400 shares by proxies filed with the Secretary.

The Secretary then read a copy of the notice of the meeting, with his certificate attached showing that a copy thereof had been mailed to each stockholder of record on or before the 17th day of October, 1917. He also presented copies of the *Newark Advertiser* and the *Jersey City Journal* under date of October 19 and October 26, containing due advertisement of the meeting. The proof of notice as presented was ordered received and filed.

The Secretary produced the stock and transfer books of the Company, together with an alphabetical list giving the name, residence, and number of shares of stock held by every stockholder entitled to vote in the election of directors. This list remained open to inspection during the election of directors and for the entire time of the meeting.

The minutes of the preceding annual meeting were then read and approved. The minutes of the special meeting of stockholders held September 10, 1917, were also read and approved.

Upon motion duly seconded and carried, Messrs. W. B. Johnson and D. L. Boyd were appointed Inspectors of Election, were duly sworn, and the meeting then proceeded to the election of directors. The election was held by ballot and the polls were opened at 10:15 o'clock A.M. and closed at 11:15 o'clock A.M.

The Inspectors thereupon presented their report in writing showing that Frederick H. Colgate, Benson R. Vale, William R. Buchanan, Malcolm R. Rigby, and Robert H. McCarter had received a plurality of all the votes cast, and the said parties were thereupon declared to be the duly elected directors of the Company for the ensuing year and until the election of their successors.

The annual report of the President was then presented and upon request was read by him. The report was by motion unanimously carried, ordered received, and filed.

The Treasurer's annual report was submitted, and, no objection being offered, was ordered received and filed.

The report of the committee appointed at the special meeting of stockholders held September 10, 1917, to examine the accounts of the Company, was received, and by motion its findings were approved and the report ordered received and filed.

Upon motion duly made and unanimously adopted, the Board of Directors were authorized to secure plans and estimates for enlarging the plant of the company.

There being no further business before the meeting, motion to adjourn was unanimously adopted.

FREDERICK H. COLGATE, *President*

W. A. THOMPSON, *Secretary*

(See Chapter XXXIX, "Annual Meeting of Stockholders.")

Form 112. Minutes of Special Meeting of Stockholders

MIDVALE FOUNDRY COMPANY
of
NEW JERSEY

MINUTES OF SPECIAL MEETING OF STOCKHOLDERS
Held November 19, 1917

The stockholders of the Midvale Foundry Company assembled in special meeting in the office of the Company at Midvale, New Jersey, at 10 o'clock in the forenoon on the 19th day of November, 1917, pursuant to call of the President followed by due notice thereof to the stockholders.

The meeting was called to order by Mr. Frederick H. Colgate, President of the Company; the Secretary of the Company, Mr. W. A. Thompson, officiating as recording officer.

The entire capital stock of the Company was represented at the meeting, either in person or by proxy filed with the Secretary.

The Secretary presented the Call and Notice pursuant to which the meeting was held, with his certificate that said notice had been sent out not less than twenty days before the date of meeting. The Call and Notice were ordered spread upon the Minute Book immediately following the minutes of the meeting.

The President then stated briefly that the meeting was assembled to consider a proposition from the Midvale Steel Company for the consolidation of the two companies under the general name of the New Jersey Foundry Company, the new company to have a capitalization of One Million, Five Hundred Thousand Dollars ($1,500,000) and stock in both companies to be exchanged for stock of the new company, share for share.

A discussion of the proposition disclosed considerable opposition mainly on the ground that the financial conditions of the Midvale Steel Company were not such as to make the desired consolidation advantageous.

Replying to this objection, the President stated that the financial statement of the Midvale Steel Company as presented in the proposition from that Company, apparently misrepresented its real condition, and suggested that an adjournment of the meeting be taken until 10 o'clock A.M. on the following day, in order to permit the officers of the Midvale Steel Company to furnish authoritative information on this point.

No objection being offered to this suggestion, the President declared the meeting adjourned to assemble again in the office of the Company at 10 o'clock A.M., November 20, 1917.

FREDERICK H. COLGATE,
President

W. A. THOMPSON,
Secretary

(See Chapter XL, "Special Meetings of Stockholders.")

Form 113. Minutes of Adjourned Meeting of Stockholders

MIDVALE FOUNDRY COMPANY
of
NEW JERSEY

MINUTES OF ADJOURNED SPECIAL MEETING OF STOCKHOLDERS
Held November 20, 1917.
(Adjourned from meeting of November 19, 1917.)

The stockholders of the Midvale Foundry Company met in adjourned meeting in the office of the Company at Midvale, New Jersey, at 10 o'clock in the forenoon on the 20th day of November, 1917.

Mr. Frederick H. Colgate called the meeting to order and presided. Mr. W. A. Thompson acted as Secretary of the meeting.

The stockholders of the Company were all present in person or by proxy.

The minutes of the special meeting of stockholders held on the preceding day and from which the present meeting was adjourned, were read for the information of those present.

The President then presented and read to the meeting a letter from the Treasurer of the Midvale Steel Company, explaining satisfactorily the financial conditions of that Company.

The President further stated that the proposed consolidation had already been authorized, on the terms set forth, by the stockholders of the Midvale Steel Company and that if it were also authorized by the Midvale Foundry Company, the proper action would be taken by the Boards of Directors and officials of the respective companies to consummate the consolidation at the earliest possible moment.

The following resolution was then offered by Mr. Charles H. Curtis:

(See Form 85.)

After a short discussion, Mr. D. V. Jackson moved that the resolution be adopted. The motion was seconded by Mr. Henry B. Vale, and was carried by unanimous vote.

There being no further business before the meeting, the President declared it adjourned.

FREDERICK H. COLGATE, *President*

W. A. THOMPSON, *Secretary*

The proposition for consolidation presented at the special meeting of the stockholders of the Midvale Foundry Company does not appear appended to the minutes of that meeting as it would properly appear in the minutes of the directors' meeting at which final action upon it is taken, and does not require to be brought into both minutes.

Directors' Meetings

The general form of directors' minutes is the same as for those of stockholders' meetings. It is, however, customary to enter the names of those present, which is not usually done in the case of stockholders' meetings.

Form 114. Minutes of Regular Meeting of Directors

FAIRFIELD CEMENT COMPANY
of
New York

Minutes of Regular Meeting of Directors
Held October 14, 1917

The Board of Directors of the Fairfield Cement Company of New York assembled in regular meeting in the office of the Company, Fairfield, New York, at 3 o'clock in the forenoon on Wednesday, October 14, 1917.

The meeting was called to order and presided over by William A. Pierce, President of the Company. Mr. Morris H. Goodrich, Secretary of the Company, acted as Secretary of the meeting.

Present: Messrs. William A. Pierce, John H. Pickering, Walter S. Laighton, John K. Bates, Fred N. Barney, and Morris H. Goodrich, constituting a quorum of the Board.

The minutes of the preceding meeting of September 9, 1917, and of the meetings of September 15 and of September 18 and September 25 adjourned therefrom, were read and approved.

The President reported that the new plant of the Company at the West Valley marl beds was progressing rapidly and should be completed on or before December 15. He also stated that arrangements had been made for the installation of the necessary machinery and for the general equipment of the plant, and that it was hoped it would be in full operation before the close of the year.

The President also reported that the Deering Construction Company was about to contract for a large amount of cement, aggregating nearly One Hundred Thousand (100,000) barrels, with deliveries extending over a year, and that he felt confident that if the Company would make the proper concessions as to price that the contract could be secured, and asked that the Board authorize him to make such concessions—not exceeding fifteen cents per barrel—as might be necessary to secure said contract.

The President further reported that additional funds amounting to about Forty Thousand Dollars ($40,000) would be required for the completion of the West Valley plant not later than December 15, 1917, and

asked the Board to take such action as might be necessary to secure these needed funds.

The Treasurer then submitted a report giving the receipts and expenditures for the past month and showing a present cash balance on hand of $5,525.25.

Mr. Arthur Hurd, Counsel for the Company, reported that his investigations of the titles of the marl beds lying to the north of the Company's West Valley beds had disclosed some apparent imperfections, and he therefore advised the Board to postpone the consummation of the purchase of these beds until the titles were put in satisfactory shape.

The President's recommendations were then taken up, and after some discussion the President was authorized by motion unanimously carried to make such discounts to the Deering Construction Company—not exceeding fifteen cents per barrel—as might be necessary to secure the contract mentioned.

The matter of finance for the West Valley plant was by unanimous consent deferred until the next meeting of the Board.

The report of the Company's Counsel in regard to the marl beds north of the West Valley beds was then taken up for discussion. Mr. Walter S. Laighton urged that no lengthy delay should be permitted, stating that he was personally cognizant of the fact that other parties were desirous of securing these same marl beds and that the present option under which the beds were held would expire in three weeks from date and he was positive could not be renewed at anything like the present option price. Mr. Arthur Hurd, Counsel for the Company, thereupon stated that his investigations could be completed inside a week, and on motion duly carried, the meeting was adjourned to assemble again in the office of the Company, October 21, at 3 o'clock P.M.

WILLIAM A. PIERCE, *President* — MORRIS H. GOODRICH, *Secretary*

(See Chapter XLI, "Meetings of Directors.")

Form 115. Minutes of Adjourned Meeting of Directors

FAIRFIELD CEMENT COMPANY
of
NEW YORK

MINUTES OF ADJOURNED MEETING OF DIRECTORS
Held October 21, 1917
(Adjourned from regular meeting of October 14, 1917.)

The Board of Directors of the Fairfield Cement Company met in adjourned meeting in the office of the Company at Fairfield, New York, at 3 o'clock in the afternoon, Tuesday, October 21, 1917.

The meeting was called to order and presided over by the President, Mr. William A. Pierce. The Secretary of the Company, Mr. Morris H. Goodrich, acted as Secretary of the meeting.

There were present Messrs. William A. Pierce, John H. Pickering, Walter S. Laighton, John K. Bates, Fred N. Barney, Silas H. Harvey, and Morris H. Goodrich, constituting a quorum of the Board.

The minutes of the board meeting of October 14, 1917, were read for the information of those present.

After the reading of the minutes, Mr. Arthur Hurd, Counsel for the Company, reported that his investigation of the titles of the marl beds lying north of the West Valley beds had been completed, that the defects to which he had referred in his previous report had been overcome, that the titles were now in good shape, and that the purchase of the beds could be safely consummated.

Thereupon on motion of Mr. John H. Pickering, seconded by Mr. Walter S. Laighton and carried by unanimous vote, the following resolution was adopted:

(See Form 98)

There being no further business before the meeting, it was adjourned.

WILLIAM A. PIERCE, *President* — MORRIS H. GOODRICH, *Secretary*

Form 116. Minutes of Special Meeting of Directors

FAIRFIELD CEMENT COMPANY
of
NEW YORK

MINUTES OF SPECIAL MEETING OF DIRECTORS
Held December 7, 1917

The Board of Directors of the Fairfield Cement Company of New York met in special meeting pursuant to due call and waiver, in the office of the Company at Fairfield, New York, at 3 o'clock in the afternoon on the 7th day of December, 1917.

The meeting was called to order and presided over by Mr. William A. Pierce, President. The Secretary of the Company, Mr. Morris H. Goodrich, recorded the proceedings of the meeting.

There were present Messrs. William A. Pierce, John H. Pickering, Walter S. Laighton, John K. Bates, Fred N. Barney, Silas H. Harvey, and Morris H. Goodrich, constituting a quorum of the Board.

The Secretary presented the call and waiver signed by every member of the Board, pursuant to which the meeting was held. In the absence of objection, the President ordered the call and waiver to be spread upon the Book of Minutes immediately following the minutes of the present meeting.

The President then reported that a very serious accident had occurred at the Fairfield plant, the boilers in the power house having exploded, tearing out one side of the power house and seriously injuring

three of the employees of the Company. He further stated that new boilers for the Fairfield plant had been ordered at least two months ago and that the old boilers were being used only until they could be replaced with these new boilers. . . . He then called upon Mr. Arthur Hurd, Counsel for the Company, for a statement as to the legal situation.

Mr. Hurd said that in his opinion the injured employees had a clear case against the Company for damages, which might be heavy as the boilers were known to be in defective condition, and suggested that a settlement out of the courts would probably be politic as well as economical.

After some discussion the following resolution was adopted by unanimous vote:

(See Form 99.)

There being no further business before the meeting, it was declared adjourned.

WILLIAM A. PIERCE,
President

MORRIS H. GOODRICH,
Secretary

Call and Waiver of Notice hereto.

MORRIS H. GOODRICH,
Secretary

(See Chapter XLI, "Meetings of Directors.")

CHAPTER LXXVII

REPORTS

Under the laws of most of the states corporations are compelled to make certain reports to the authorities, mainly for purposes of taxation. Blanks for such reports are supplied by the state or local authorities and may usually be filled with but little trouble. A knowledge of the tax laws is, however, necessary at times in order to avoid excessive taxation, and in all cases where the amounts involved are material, legal advice should be employed in the preparation of these reports. On account of their wide variation in form in the different states, these tax reports are not presented here, the present chapter being entirely confined to the reports made to the stockholders at their annual meeting. The forms given are merely suggestive, as reports will necessarily vary with the conditions.

The usual reports submitted to the stockholders at their annual meeting are those of the president and treasurer. If matters of special interest or importance have occurred within the province of other officials, they may be called upon for reports. If any stockholders' committees have been appointed for special investigations or other purposes, they will also usually report to the annual meeting.

The president's report is intended to give a general review of the company's operations during the preceding year and a statement of its condition at the time of the report. (See § 355.)

The president's report is usually the most important of those made to the stockholders at the annual meeting. In many cases it is the only formal report. Its contents will vary

with the operations of the corporation. When it is the only report made, it will include the financial statements that are usually given in the report of the treasurer. Any matters pertaining to the progress of the corporate business would properly be brought out in the report of the chief executive officer.

The report that follows is brief but sufficiently comprehensive to meet the proper demands of the stockholders. A formal balance and income sheet would be attached and the whole would constitute the annual report to stockholders.

Form 117. President's Annual Report to Stockholders

REPORT OF PRESIDENT

To the Stockholders of the
AMERICAN COAL PRODUCTS COMPANY:

The Directors herewith submit for the information of the Stockholders the following financial statements covering the fiscal year ended December 31, 1915:

Against operations for the year 1915 we have written off a sufficient proportion of the cost of our new plants to bring their capitalization down to a peace basis. We have also instructed all of our subsidiary companies, in making their returns for the year, to charge off doubtful items.

Upon our regular profit-sharing plans and special compensation to all of our wage earners we have provided out of our earnings of the year for the distribution of approximately $550,000, partly in cash and partly in stock. Every employee of the Company has received some definite benefit from its prosperity.

After deducting the above items the net profit for the year amounts to		$2,902,236.30
Deducting 7% cash dividends on Preferred Stock		175,000.00
Leaves		$2,727,236.30
This has been apportioned by the Directors as follows:		
Dividends on Common Stock:		
In Cash 7%	$ 761,932.50	
In Common Stock 5%	538,000.00	
Reserves	420,000.00	
Surplus	1,007,303.80	$2,727,236.30
The excess of current assets over current liabilities has increased during the year by		$3,389,727.30
and now stands at		$8,245,776.93

The $2,000,000 of notes outstanding a year has been paid by an issue of approximately the same amount of Preferred Stock. The Company has no obligations at any bank, and $900,000 in marketable securities in excess of ordinary needs.

The reincorporation of the company under the name of "The Barrett Company" with a similar amount of stock as this company has been completed and stock certificates in the new corporation are being prepared and will be exchanged share for share for all outstanding certificates in this company. Due notice will be sent to all shareholders.

Appended hereto are Consolidated Income account for the year 1915 and Comparative Consolidated Balance Sheet as December 31, 1915 and 1914.*

Respectfully submitted,

WILLIAM HAMLIN CHILDS,
President

March 1, 1916.

If the president's report is read, it gives an opportunity during its reading or at its end for stockholders' questions and the explanation of any points which are not entirely clear in the report.

Form 118. Treasurer's Annual Report to Stockholders

FREEMAN HARDWARE COMPANY

TREASURER'S ANNUAL REPORT

PROFIT AND LOSS STATEMENT
Year ending January 1, 1917

Gross Sales		$235,125.72
Returns and Allowances to be deducted		9,875.24
		$225,250.48
Cost of Sales, including Manufacturing, Purchase Costs, Freight, etc.		135,154.24
Gross Profits from Sales		$90,096.24
Deduct:		
Selling Expenses:		
Salaries of Sales Force	$10,750.00	
Commissions	2,895.25	
Traveling Expenses	7,962.50	

* Statements omitted.

Advertising	5,125.75		
Miscellaneous Items	1,250.00		
Total Selling Expenses		$27,983.50	
General and Administrative Expenses:			
Salaries, Officers	$12,000.00		
" Office Employees	7,500.00		
Office Supplies	785.25		
Postage	425.34		
Telephone and Telegrams	325.40		
Depreciation	250.00		
Miscellaneous	250.74		
Total General and Administrative Expenses		21,536.73	49,520.23
			$40,576.01
Interest, Discounts and Allowances:			
Interest on Bonds ($100,000 at 6%)	$6,000.00		
Discount on Sales	$7,542.25		
" " Purchases	4,125.35	3,416.90	
Net Interest Charges		$9,416.90	
Allowance for Doubtful Accounts		2,750.24	12,167.14
Net Profits, year ending January 1, 1917			$28,408.87

BALANCE SHEET, JANUARY 1, 1917

Assets

Real Estate:			
Land—20 acres at Mahwah, N.J.		$7,500.00	
Factory Buildings at Mahwah, N. J.		95,275.84	
Store Site, New York		80,000.00	
Building, New York		40,000.00	$222,775.84
Factory Equipment:			
Machinery		$65,249.87	
Belting, Shafting, etc.		5,742.24	
Small Tools		1,215.55	72,207.66
Store Equipment:			
New York			5,742.25
Office Equipment:			
New York		$1,200.00	
Mahwah, N. J.		250.00	1,450.00
Total Fixed Assets			$302,175.75

Cash:			
In Bank	$12,725.25		
On Hand	336.25	$13,061.50	
Accounts Receivable:			
Trade Debtors	$35,725.22		
Deduct Reserve for Doubtful Accounts	1,250.25	34,474.97	
Notes Receivable		16,000.00	
Inventories:			
Finished Products and Stock on Hand	$85,242.25		
Goods in Process	18,924.25		
Raw Materials	70,262.24		
Factory Supplies	1,982.25		
Fuel	1,250.24		
Miscellaneous Small Items	1,225.35	178,886.58	
Total Floating Assets			242,423.05
Total of Assets			$544,598.80

Liabilities

Capital Stock:			
3,000 shares (par value $100 each)		$300,000.00	
Bond Issue:			
100 Bonds (par value $1,000 each)		100,000.00	
Total Fixed Liabilities			$400,000.00
Accounts Payable:			
Trade Creditors		$30,724.28	
Sundry Personal Accounts		525.20	
Notes Payable		28,235.62	
Total Floating Liabilities			59,485.10
Surplus:			
Balance, January 2, 1916		$56,704.83	
Net profit—year ending January 2, 1917		28,408.87	85,113.70
Total of Liabilities			$544,598.80

Respectfully submitted,

JAMES H. WALLACE,
Treasurer

New York City, N. Y.,
January 2, 1917.

The treasurer's annual report should give an accurate presentation of the financial results of the year's operation and of the existing financial condition of the company. To what detail it should extend will depend entirely on conditions. Business prudence usually forbids a complete statement even if it were otherwise desirable. (See § 355.)

The treasurer's report is presented to the meeting and is usually held open to inspection while the meeting is in progress but is seldom read unless it is short, or is to be specially considered, or the reading is requested. In the larger corporations the report is usually printed for distribution among the stockholders.

The treasurer's report may be entirely informal, giving only the general results of the operations for the past year; or it may be a detailed statement of the company's financial condition at the end of the year; or it may take the form of a complete balance sheet with profit and loss statement. The following which is taken from the annual report of the United Fruit Company outlines the information given by the treasurer in detailed exhibits and gives an idea of the extent of the complete report.

Form 119. Introduction to Treasurer's Report

TREASURER'S REPORT

To the President and Board of Directors
of the UNITED FRUIT COMPANY:

GENTLEMEN:

I hand you herewith statements covering the operations of the Company for the fiscal year ending September 30, 1915, together with reports showing its financial condition on that date, viz.:

Income Account
Balance Sheet
Cost of Plantations and Equipment
Live Stock
Area of Owned and Leased Lands
Area of Cultivations

Railways
Steamship Service
Insurance Fund

Respectfully Submitted,

CHARLES A. HUBBARD,
Treasurer

Boston, December 3, 1915.

A committee report, unless of considerable length, is usually presented and read. If too lengthy to permit of this, and of sufficient importance to justify the expense, it is printed for distribution.

Form 120. Report of Committee on By-Laws

TERREBONNE CEMENT COMPANY

REPORT OF COMMITTEE ON BY-LAWS

To the Stockholders of the
TERREBONNE CEMENT COMPANY.

GENTLEMEN:

Your committee appointed at the last annual meeting of the stockholders to report any needed modification in the By-laws of this Company, begs to submit the following:

1. We would recommend the addition of a by-law providing for an Executive Committee, to consist of three members of the Board of Directors, such Committee to have full control of the general business affairs of the Company in the interim between meetings of the Board.

2. We would recommend that the present by-law relating to the regular meetings of the Board of Directors be so changed as to provide for quarterly meetings instead of monthly meetings as at present.

3. We strongly disapprove of the suggested amendment to the by-laws whereby the amount of indebtedness which may be incurred by the directors on behalf of the Company at any one time is increased from $10,000 to $25,000, as we believe such change to be not only unnecessary but against the interests of the Company.

Respectfully submitted,

JAMES F. GOUGH,
HARKNESS H. LEWIS,
OLIVER H. SIMPSON,
Committee on By-laws

New York City,
January 15, 1917.

CHAPTER LXXVIII

MISCELLANEOUS NOTICES[1]

Assessment Notices

The following form of mailing notice is suitable when subscriptions are payable in instalments on demand of the board. (See Forms 8-13.)

Form 121. Instalment Notice

HILBERT DESK COMPANY
225 Main St., Grand Rapids, Mich.

Instalment Notice

Mr. Howard Burns,
Sparta, Mich.:

Dear Sir:

You are hereby notified that by due resolution of the Board of Directors, an instalment of Ten Per Cent on subscriptions to the stock of this Company has been called for, the amount thereof to be paid to the Treasurer of the Company on or before the 15th day of October, 1917.

Henry H. Hilbert,
Treasurer

Grand Rapids, Mich.,
October 1, 1917.

Shares subscribed, 25.
Amount of Assessment, $250.

Draw checks payable to Treasurer.

The following form of assessment notice may be used as either a mailing or publication notice.

[1] For notices of corporate meetings see Forms 59-68.

Form 122. Notice of Stock Assessment

BURNS REFRIGERATING COMPANY

ASSESSMENT NOTICE

Notice is hereby given that assessment No. 2 of Fifteen Per Cent on the subscribed Capital Stock of this Company has been called for by due resolution of the Board of Directors and is payable to the Treasurer of the Company on or before the 18th day of September, 1917.

Newark, New Jersey,
August 15th, 1917.

FRANCIS H. WILSON,
Secretary

Make checks payable to Treasurer.

In some states the directors have statutory power to levy assessments under certain conditions. In several of the western states the statutes prescribe the form of notice for such assessments. This is substantially as follows:

Form 123. Notice of Stock Assessment—Statutory

RED GULCH MINING COMPANY
Sacramento, California

Notice is hereby given that at a meeting of the Directors held on the 10th day of October, 1917, an assessment of Ten Dollars per share was levied upon the Capital Stock of the corporation, payable on the 12th day of November, 1917, to the Treasurer of said Red Gulch Mining Company at its principal office, No. 584 J. Street, Sacramento, California. Any stock upon which this assessment shall remain unpaid on the 27th day of November, 1917, will be delinquent and advertised for sale at public auction, and unless payment is made before, will be sold on the 12th day of December, 1917, to pay said delinquent assessment together with costs of advertising and expenses of sale.

JOHN H. MCCLELLAND,
Secretary
584 J. Street, Sacramento, Cal.

October 10, 1917.

This notice must be served upon each stockholder either personally or by mail, and must also be published.

In case assessments are not paid when due, public notice must be given before the delinquent stock can be sold. A general form of assessment notice to be used where the specific form is not prescribed by statute, is as follows:

Form 124. Notice of Sale of Delinquent Stock

BURNS REFRIGERATING COMPANY

NOTICE OF SALE OF DELINQUENT STOCK

Notice is hereby given that the undersigned, Treasurer of the Burns Refrigerating Company, will on order of the Board of Directors and pursuant to the statutes in such case made and provided, sell at public auction on the 2nd day of November, 1917, at 2 o'clock in the afternoon at the office of the Company, 345 Broad St., Newark, New Jersey, Twenty (20) Shares of the stock of said Company now standing in the name of Howard T. Carleton, or so many of said shares as may be sufficient to satisfy the unpaid assessment on said shares amounting to Three Hundred Dollars ($300), and also the interest thereon from the 18th day of September, 1917, to the date of sale, and all necessary incidental charges.

Fifty Dollars ($50) per share has already been paid the Company on said stock.

HOWARD W. BRONSON,
Treasurer

Newark, N. J.,
October 1, 1917.

DIVIDEND NOTICES

In the smaller corporations dividend notices are usually sent only by mail. In the larger corporations they are almost invariably published and are usually also sent by mail.

Form 125. Dividend Notice—Mailing

CHARLESTON MILLING COMPANY
785 Grand St., New York

December 1, 1917.

DEAR SIR:

You are hereby notified that the Directors of the Charleston Milling Company have this day declared the regular semiannual dividend of

Three Per Cent on the Capital Stock of the Company, payable December 15, 1917, to stockholders who appear of record at the close of business December 14, 1917.

HARRY H. MCCALLUM,
Treasurer

If the transfer books are closed preparatory to payment of dividends, the dates of closing and reopening should appear as in the following notice, which may be used either for publication or for mailing.

Form 126. Dividend Notice—Publication

MARTIN FOUNDRIES COMPANY

NEW YORK, October 1, 1917.

DIVIDEND NO. 25

The Directors of the Martin Foundries Company have this day declared a quarterly dividend of One and One-Half Per Cent on the Capital Stock of the Company, payable October 30, 1917, to stockholders of record at the close of business October 10, 1917.

Transfer books will close October 10, 1917, and reopen October 19, 1917. Checks will be mailed.

JOHN H. MARTIN,
Treasurer

When notice of dividends is by publication alone, an explanatory statement usually accompanies the dividend check. An announcement of this nature used by some of the larger corporations is given in the following form.

Form 127. Notice Accompanying Dividend Check

MARTIN FOUNDRIES COMPANY

NEW YORK, October 30, 1917.

On October 1st, 1917, the Directors declared quarterly dividend No. 25 of One and One-half Per Cent upon the Preferred Stock of the Company, payable this day to stockholders of record of October 10, 1917.

In accordance with permanent order on file, enclosed please find check for above dividend on the Preferred Stock standing in your name. No acknowledgment is necessary.

Kindly advise John J. Hart, Assistant Secretary, No. 575 Broadway, New York, of any change in your address, giving your old address as well as the new.

JOHN H. MARTIN,
Treasurer

Dividend check enclosed which please cash immediately.

The following publication notice is somewhat informal but sufficient.

Form 128. Dividend Notice

UNITED STATES MOTOR COMPANY

Dividend No. 25 of ½ of 1% on the Common Stock, for the quarter ending June 30, 1917, was declared July 28, payable September 30, to stockholders of record September 9. Transfer books close at 3 P.M. September 9 and reopen at 10 A. M., October 1, 1917.

RICHARD HARDING,
Secretary

This notice is signed by the secretary of the corporation, who in this case is also its treasurer. Usually, though not necessarily, dividend notices are signed by the treasurer.

Form 129. Dividend Notice—Common Stock

OFFICE OF
AMERICAN REDUCTION COMPANY

No. 145 BROADWAY, NEW YORK CITY,
September 4, 1917.

QUARTERLY COMMON STOCK DIVIDEND No. 17

The Directors of the American Reduction Company have this day declared a dividend of Two Per Cent on the Common Capital Stock of the Company, payable October 15, 1917, to stockholders of record September 28, 1917. The books of the Company for the transfer of Common Stock will be closed at 3 o'clock P.M., September 28, 1917, and will be reopened October 2, 1908.

M. W. ERICKSON,
Secretary

The following publication notice covers the dividend on both common and preferred stock. This inclusion is not in any way objectionable, but at times, for the sake of greater emphasis and publicity, a separate notice for each dividend is preferred.

Form 130. Dividend Notice—Common and Preferred Stock

McKINNEY COMPANIES

The regular quarterly dividend of One Per Cent on the Preferred Shares and the regular quarterly dividend of One Per Cent on the Common Shares in the McKinney Companies will be paid January 2, 1918, to shareholders of record as they appear at the close of business December 14, 1917.

The transfer books will be closed for four days only, December 15, 16, 17, and 18, 1917.

HORACE C. KING,
Secretary

Dated November 27, 1917.

Form 131. Dividend Notice—Mailing Orders Requested

SOUTHERN PACIFIC CO.

DIVIDEND NO. 43

A Quarterly Dividend of one dollar and fifty cents ($1.50) per share on the Capital Stock of this Company has been declared payable at the Treasurer's Office, No. 165 Broadway, New York, N. Y., on July 2, 1917, to stockholders of record at 3 o'clock P. M., on Thursday, May 31, 1917. The stock transfer books will not be closed for the payment of this dividend. Cheques will be mailed only to stockholders who have filed permanent dividend orders.

A. K. VAN DEVENTER,
Treasurer

May 10, 1917.

The mailing order referred to in the foregoing dividend notice is shown on the following pages. The form as given is an exact reproduction of the original.

Form 132. Mailing Order for Dividends

Dividend Mailing Order

No Cheque Mailed Without an Order

To the Treasurer of **Southern Pacific Company,**

165 Broadway, New York, N. Y.

Until this order shall be revoked in writing, please send by mail, in cheque payable to the order of.....

See printed instructions. **(Please write distinctly.)** **Address in full** .....

.....

.....

all dividends now due, or which may hereafter become due, on all stock now standing or which may hereafter stand, on the books of your Company in.....*name.*

(Date) .....

Sign here exactly as name appears on stock .....

.....

.....

When payment is to be made to other than the stockholder, signature of the latter MUST be acknowledged before a Notary Public on the back of this order, and if signed by an Attorney, Administrator, Executor, Guardian or Trustee, it MUST be accompanied by satisfactory evidence of the signer's authority.

On the back of this mailing notice appears form for notarial acknowledgment.

Notices of Appointment

When an election is held, it devolves upon the secretary to notify the officials-elect.

Form 133. Notice of Election as Director

ORVELLE MACHINE WORKS
Trenton, New Jersey

December 10, 1917.

Mr. George W. Bromleigh,
236 Greenwood Ave.,
Trenton, N. J.

Dear Sir:

You are hereby notified that at the annual meeting of the Orvelle Machine Works held this day, you were elected a member of its Board of Directors.

The next regular meeting of the Board will be held in the office of the Company, January 5, 1918, at 3 o'clock P.M., for the election of officers and for the transaction of such other business as may come before the meeting.

You are requested to be present and participate in that meeting.

Respectfully,

MARTIN B. HEREFORD,
Secretary

Usually before the election of a director, those interested assure themselves that he will serve if elected. In such case the notification need not ask his acceptance of the position. If, however, there is any uncertainty, the notification of election should request a formal acceptance of the position. If the director-elect refuses to accept, his election is void, as he cannot be forced into office against his will.

Form 134. Notice of Election as Director—Acceptance Requested

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BLACK DIAMOND DRILL COMPANY
23 State St., Boston, Massachusetts

October 10, 1917.

Mr. HORACE H. FLEMING,
1716 State St.,
Boston, Mass.

DEAR SIR:

At a meeting of the Directors of this Company held this 10th day of October, 1917, you were elected a member of the Board to fill the vacancy caused by the death of Mr. Frederick Colwell. Will you kindly indicate your acceptance of the position at your early convenience.

Respectfully,

SIMRELL B. IVES,
Secretary

As a rule, when corporate officials are elected, either the officers-elect are present at the meeting at which their election occurs, or are in such close personal touch with the corporate proceedings that formal notice of their election is unnecessary.

If, however, a stranger is elected to an official corporate position, notice must be given.

Form 135. Notice of Election as General Manager

WILLIS OIL WELL COMPANY
265 Madison Avenue, New York

October 1, 1917.

Mr. Henry P. Simpson,
445 Greenwood Ave.,
Newark, New Jersey.

Dear Sir:

At a meeting of the Board of Directors of this Company held this day, you were elected General Manager of the Company at a salary of Twenty-four Hundred Dollars per annum, payable in monthly instalments of Two Hundred Dollars each, your employment and duties to begin on the 15th day of October, 1917, and the first instalment of your salary to be due and payable on the 15th day of the following month.

Will you kindly notify me without delay of your acceptance of the position and report for duty on the day above designated.

Yours very truly,

Gerald E. Conway,
Secretary

If it is doubtful that the party elected will accept the position, his appointment and notice thereof are usually made tentative as in the following example.

Form 136. Tender of Position as Sales Manager

HOWARD DESK COMPANY
25 Stone St., New York

October 30, 1917.

Mr. Willis H. Walters,
225 Broadway, New York.

Dear Sir:

I am instructed by the Board of Directors to tender you the position of Sales Manager of this Company at a salary of $1,800 per annum, payable in monthly instalments of $150 each, your employment and duties to begin in case of your acceptance, on the 10th day of November, 1917.

Your early action in the matter will greatly oblige,

Yours very truly,

Sherwin F. Hamilton,
Secretary

CHAPTER LXXIX

RESIGNATIONS

Resignations may be divided into two general classes—those which are so phrased as to be completely effective without an acceptance, which may be termed peremptory resignations, and those which are tentative in their nature and therefore not effective until accepted. The following form is of the latter nature.

Form 137. Resignation of Director

To the Board of Directors of the
HOWARD SCALE COMPANY.

GENTLEMEN:

On account of my continued ill health, which prevents my proper attention to the duties of the position, I hereby tender my resignation as a member of your body.

Very respectfully,

HENRY H. GALE

New York City,
September 30, 1917.

If a resignation of this kind is accepted without qualification, its effect is immediate and the resigning director, though present at the meeting, ceases to be a director at the moment the resolution or motion of acceptance is adopted. If it is desired to avoid this, acceptances may be phrased "to take effect at the close of the meeting." It may be noted in this connection that a director retiring by resignation cannot legally vote on his own successor. The vacancy does not exist until his resignation is effective and thereafter he is not a director.

Dummy directors are sometimes elected to fill a position or vacancy in the board until a permanent incumbent is elected. In such case the dummy director's resignation in tentative form is usually secured at the time of his election and is placed on file. Then when a suitable person for permanent director has been found, the resignation on file is accepted and the successor is at once elected. The following form of resignation is commonly used under such circumstances.

Form 138. Resignation of Director—Effective on Acceptance

To the Board of Directors of the
HARVARD PUBLISHING COMPANY.

GENTLEMEN:

I hereby tender my resignation as a member of your body, to take effect upon acceptance.

Respectfully,
FRANK MCCLELLAND

New York City,
September 1, 1917.

This resignation holds good until acceptance or until the party's term as director expires, unless sooner withdrawn. If the party is again elected as a director, his old resignation is of no further effect and must be renewed if his same uncertain tenure of office is to be maintained. It must be remembered, however, that a party tendering such a resignation has the right to withdraw it or to revoke it at any time prior to its acceptance.

The final clause of the foregoing resignation, while conventional, is of no direct effect. A "tendered" resignation cannot take effect until accepted.

The following form terminates the official status of party signing same as soon as the document is filed with the secretary of the company. No action of the board is required

nor can the board in any way prevent its effect. This peremptory form of resignation is often employed in cases where a director wishes to escape responsibility for some proposed action of the board or wishes to express his disapproval of some board action. It does not relieve him from any responsibility for past actions but does relieve him from responsibility for any future board actions.

Form 139. Resignation of Director—Peremptory

To the Board of Directors of the
FRANKLIN ELECTRIC CORPORATION.

GENTLEMEN:

I hereby resign my position as a director of the Franklin Electric Corporation, my resignation to take immediate effect.

Respectfully,

WILLIAM H. COLLINS

New Brighton, Pa.,
October 22, 1917.

A resignation may be made effective at a future date as in the following form. The object of such a deferred resignation is usually to give time for the selection of a suitable successor.

Form 140. Resignation of Director—Future Date

To the Board of Directors of the
COOPERSTOWN TANNERY.

GENTLEMEN:

I hereby resign my membership in your body, such resignation to be effective October 21, 1917.

Respectfully,

HOWARD MCCALL

Cooperstown, New York,
October 1, 1917.

When, as occasionally happens, some difficulty has arisen between the directors and an official, and this latter wishes

a vote of confidence or an expression of the feeling of the board towards him, he will hand in a tentative resignation as in the following form.

Form 141. Resignation of President—Conditional

To the Board of Directors of the
STANDARD MILLING COMPANY.

GENTLEMEN:

I hereby tender my resignation as President and Director of your Company and request your immediate action thereon.

Very respectfully,

HENRY H. MAXWELL

Franklin, Pa.,
November 2, 1917.

If a majority of the board wish to retain the president, they either vote that the resignation be not accepted or vote against a motion for its acceptance. In either case the president's resignation is of no effect and the incident is merely an indorsement of him and his position. If, however, those opposed to the president are a majority and accept the resignation, his official connection with the company is peremptorily terminated.

A more friendly resignation is given in the following form.

Form 142. Resignation of Treasurer

NEW YORK, October 28, 1917.

To the Board of Directors of the
OTIS MACHINE COMPANY,
43 Dey St., New York.

GENTLEMEN:

I am offered the position of Treasurer of the Los Angeles Fruit Company of Los Angeles, California, and on account of the condition of my health am very desirous of accepting the same. I therefore hereby tender my resignation as Treasurer of the Otis Machine Company and ask your acceptance of same at the earliest possible date. I would also request the early appointment of a committee to audit my accounts and

the due authorization of my successor to take over and receipt for the moneys and other property of the Company now in my charge.

Regretting the termination of my pleasant official relations with the Company and thanking you for the uniformly kind consideration accorded me by your body, I remain,

Respectfully,

JAMES H. MCDONALD

Resignations and other communications for the board of directors are frequently addressed to the secretary or even to the president of the company. The better practice is to address the communication to the board, enclosing it in an envelope addressed to the secretary or the president of the company, as the case may be. It is then the duty of the officer receiving the communication to present it to the board. Such service on, or delivery to, the president or secretary is legally sufficient.

CHAPTER LXXX

CORPORATE AND OFFICIAL SIGNATURES

The signature of a corporate official followed by his official designation is usually referred to as an "official" signature (Forms 143, 144). The name of a corporation duly affixed and evidenced by the signature of the affixing officer or officers is known as a "corporate" signature (Forms 145, 146).

Speaking generally, the corporate signature is affixed to all important instruments by which the corporation itself is to be directly and legally obligated, while the official signatures are employed by the corporate officials in matters pertaining particularly to their respective departments, in which the contract relations of the corporation do not enter in, or, if otherwise, the authority of the officer signing is sufficient to sustain his action.

Thus, the president signs reports, letters, instruments, etc., with his official signature; the treasurer signs notices of dividends or assessments, financial statements, and even corporate checks and reports in the same manner; while the secretary affixes his official signature to the minutes of meetings, to reports, notices, certificates, etc.

In regard to letter signatures, practice varies widely. In perhaps the majority of corporations the corporate signature is attached to every letter pertaining to the business of the corporation unless there is some special reason for a different signature. In many corporations, however, this practice is exactly reversed, the official signature of the writer being always employed unless there is some special reason for the corporate signature. The former is the preferable plan.

Form 143. Official Signature—Informal

Joseph H. McPherson,
President

This is the simplest form of official signature. It should be used only when the letter or other instrument to which it is appended shows plainly and unmistakably, by heading or subject matter, of what company the person signing is an official. If this is not the case, the official signature should be written in full as in the following form.

Form 144. Official Signature—Formal

Joseph H. MacPherson,
President Holland Typewriter Co.

The following corporate signature is in its simplest form.

Form 145. Corporate Signature—Informal

(1) Ramsay Water Company,
By.....
President

(2) Ramsay Water Company,
By Howard Ramsay,
President

The first of these forms shows a partial corporate signature—usually affixed by means of a rubber stamp—awaiting completion by the insertion of the president's signature as shown in the second form.

The word "By" as given in the preceding form is sometimes omitted from the corporate signature. The word is, however, employed by a majority of the best conducted cor-

porations of the country and its omission may, under some circumstances, involve the officer whose name is affixed in a personal liability. (See comment preceding Form 163.) The form as given is therefore regarded as distinctly preferable.

When the corporate signature is affixed to important instruments, usually though not necessarily two or more official signatures are employed. The seal is also usually affixed even when not legally necessary. It is to be remembered that seals were used before signatures and for many years corporations used seals without any written signatures.

Form 146. Corporate Signature—Formal

{ CORPORATE SEAL }

WESTERN CHEMICAL COMPANY,
By JOSEPH H. MCCLEARY,
President
FREDERICK WELLMAN,
Secretary

The corporate signature may be legally affixed by any corporate official or agent authorized thereto by the directors or by-laws. In all current business, however, where but one signing officer is desired, the president is usually designated, unless the transaction pertains specially to the department of some other official.

When the secretary's name is employed in a corporate signature, as in the foregoing form, no specific attestation of the seal is usual or necessary. If otherwise, the seal should be formally attested as in the following form which gives the corporate signature usually employed.

Signatures affixed to formal instruments are customarily preceded by an explanatory statement termed a "testimonium clause."

Form 147. Testimonium Clause—Corporate Signature—Seal Attested

IN WITNESS WHEREOF, the said Powell Steel Company has caused its corporate name to be hereunto subscribed by its President and its duly attested corporate seal to be hereunto affixed by its Secretary, all in the City of Hartford, State of Connecticut, on the 25th day of August, 1917.

{ CORPORATE SEAL }

POWELL STEEL COMPANY,
By ALEXANDER H. McDOWELL,
President

Attest Seal:
FRANKLIN B. LORD,
Secretary

The following is a convenient form of testimonium clause when the instrument is to be signed by two or more corporations.

Form 148. Testimonium Clause—Two Corporate Signatures

IN WITNESS WHEREOF, the said parties of the first and second parts have caused their respective corporate signatures and seals to be hereunto affixed by their duly authorized officers, in the City, County, and State of New York, on the day and year first above written.

{ CORPORATE SEAL }

ARLINGTON BRASS WORKS,
By HENRY BRIERLY,
President

Attest Seal:
JOHN H. SAVAGE,
Secretary

{ CORPORATE SEAL }

NEWARK CASTINGS COMPANY,
By HORACE D. POWERS,
President

Attest Seal:
HENRY M. SUNTHEIN,
Secretary

A more formal testimonium clause for a corporate and individual signature is as follows:

Form 149. Testimonium Clause—Corporate and Individual Signatures

In Witness Whereof, the Little Falls Carpet Company, said party of the first part, has caused its corporate seal to be affixed to this indenture and its corporate signature to be subscribed hereunto by its President and Secretary duly authorized thereunto, and the said Harrison H. Spellman, party of the second part, has affixed his signature and seal hereunto, all being done in the City of Trenton, State of New Jersey, on the day and year first above written.

{ corporate seal }

Little Falls Carpet Company,
By Willis H. Shelley,
President
James H. McClelland,
Secretary
Harrison H. Spellman [l. s.]

If a contract is signed by an agent, the corporate seal is not usually affixed.

Form 150. Testimonium Clause—Signature Affixed by Agent

In Witness Whereof, the said Milton Smelting Corporation, party of the first part, acting through its duly appointed agent, Mortimer H. Shepherd, authorized thereunto by resolution of its Board of Directors (certified copy of which resolution under the corporate seal is hereunto annexed), has caused its corporate signature to be hereunto affixed, and Samuel Jaros, party of the second part, has hereunto affixed his signature and seal, all on the day and year first above written.

Milton Smelting Corporation,
By Mortimer H. Shepherd,
Agent
Samuel Jaros [l. s.]

A copy of the resolution which authorizes the agent to execute the instrument on behalf of the corporation, duly certified under the corporate seal, should be attached to the instrument. (See also Forms 165, 166, 183, 184.)

CHAPTER LXXXI

CHECKS, RECEIPTS, AND NOTES

Corporate Checks

The form of signature to a corporate check is not material. Its purpose is merely to identify and authenticate the instrument, and any signature duly prescribed by the by-laws or by resolution of the directors and recognized by the company's bank is sufficient. Consequently, while the corporate signature is usually to be preferred, there is in practice much variation as shown in the forms which follow.

The corporate seal is seldom if ever used on corporate checks, though its use does not affect the check in any way. When the corporate funds are material in amount, the names of two officials, the president and treasurer, are usually required upon the check.

The forms of check which follow are in common use.

Form 151. Check—Corporate Signature

STANDARD RADIATOR COMPANY

No. 1754 — New York, August 1, 1917.

SEABOARD NATIONAL BANK
of the City of New York

Pay to the order of John H. Wilkins.....$425.75
Four Hundred and Twenty-Five 75/100.....Dollars.

Standard Radiator Company,
Samuel S. Steigel,
President
Stewart H. Wilson,
Treasurer

Frequently the number is placed in the upper right-hand corner of a check, the date line coming in above or below. Such an arrangement, with the other details as shown in the form given, is highly approved by bank officials, as it brings the essential features of the check—number, date, amount, payee, and signature—all well over to the right-hand side of the check in the most convenient position for rapid reference.

If the by-laws or a directors' resolution require that the corporate name be affixed by the treasurer and the check be countersigned by the president, as is frequently the case, the following form is approved.

Form 152. Check—Countersigned

MERRIVALE COAL COMPANY,
No. 1 Broadway, New York

No. 244. NEW YORK, September 8, 1917.

STANDARD NATIONAL BANK
of the City of New York

Pay to the order of Howard P. Huntington.....$475.00
Four Hundred and Seventy-Five no/100.....Dollars.

Countersigned:
JAMES J. McLANE,
President

MERRIVALE COAL COMPANY,
By HORACE P. WISNER,
Treasurer

Form 153. Check—Official Signatures

KING FURNITURE CO.
175 W. 23rd St., N. Y.

No. 1582. NEW YORK, October 1, 1917.

THE PEOPLE'S NATIONAL BANK
of New York

Pay to the order of Jesse Claire.....$125.45
One Hundred and Twenty-Five 45/100.....Dollars.

WALLACE McCOMB,
President

PERRY H. DUCROIX,
Treasurer

Form 154. Check—Official Signatures—Purpose Stated

Shoshone Mfg. Co.
325 Elm St., New York

No. 745. New York, October 1, 1917.

BANK OF MANHATTAN
of New York City

Pay to the order of James & Oliver.....$125.75
One Hundred and Twenty-Five 75/100.....Dollars.

Rudolf Hessler,
President

In full for
September printing.

Jasper H. McMeis,
Treasurer

Where the official signatures of the treasurer and the president are affixed, the form is usually as above.

There is no objection, legal or practical, to the entry on a check of the purpose for which it is issued, if so placed as not to obscure or interfere with its essential details. The advantage in the use of such a check is apparent. Duly indorsed, as it must be before payment is made, the check itself affords the best possible evidence of the settlement effected thereby, and saves the expense and trouble of a more formal receipt.

A form of check much in favor because of the prominence given to the name of the issuing corporation, is as follows:

Form 155. Check—Draft Form

ALLIS-WILKINS COMPANY
1675 Broadway, New York

No. 1728. August 15, 1917.

Pay to the order of Jesse H. Sinclair.....$35.25
Thirty-five 25/100.....Dollars.

Allis-Wilkins Company,
By Francis H. Whitman,
Treasurer

To the
Seaboard National Bank,
New York

In the smaller corporations dividends are usually paid by means of the ordinary corporate check, the words "Dividend Check" being stamped or written across its face. In the larger corporations special checks are employed for the purpose, as in the following form:

Form 156. Dividend Check

PREFERRED STOCK DIVIDEND No. 42

AMERICAN WOOL EXPORT COMPANY
New York, August 31, 1917. No. 1482.

AMERICAN NATIONAL BANK
of New York
Pay to the order of

Henry H. McCall.....$125.00
One Hundred and Twenty-Five 00/100.....Dollars.

Countersigned:
STOCK TRANSFER DEPARTMENT,
JOHN FRENCKEL, *Transfer Agent*

FRANK S. JORDAN,
Treasurer

No receipt is usually required when this form of dividend check is employed, the duly indorsed check in itself affording the best possible evidence of payment of the dividend.

The ordinary indorsement of a corporate check is given in the following form.

Form 157. Indorsement of Corporate Check

VOGEL SHOE COMPANY,
RALPH A. SMITH,
Treasurer

This indorsement is usually affixed by the treasurer or cashier, though the president is frequently authorized thereto.

The following form of indorsement is usually affixed in its entirety—corporate name, official signature, and all—with a rubber stamp. Such an indorsement is approved by the banks and, on account of the rapidity and convenience with which it may be affixed, is generally employed.

Form 158. Indorsement of Check for Deposit

Pay to the Order of the
Chase National Bank
Howell Hardware Company,
John Blake, *Treasurer*

The following is a common form of corporate draft, signed by one official.

Form 159. Corporate Draft

No. 745. New York, October 1, 1917.

Three days after sight pay to the order of
Seaboard National Bank of New York.....$1,245.25
Twelve Hundred and Forty-Five 25/100.....Dollars
payment of account as per our statement of September 1, 1917.
Value received. Charge same to account of

Car Equipment Company,
By Howard James,
Treasurer

To North Wheeling Car Co.,
Wheeling, West Virginia

Corporate Receipts

A common form of corporate receipt is as follows:

Form 160. Corporate Receipt

Metropolitan Realty Co.
325 Cedar St., N. Y.

$250.00 New York, July 15, 1917.

Received from Edward M. Blair Two Hundred and Fifty Dollars, rental of Store at No. 65 Vesey St. for September.

Metropolitan Realty Company,
By Samuel F. Watkins,
Treasurer

It would seem preferable that all receipts for money received by a corporation should be given in the corporate name. In practice, however, corporate receipts are commonly signed by the treasurer. In such case the name of the corporation should appear prominently.

Form 161. Corporate Receipt—Official Signature

$725.25 September 15, 1917.

WELLMAN SUPPLY CORPORATION
265 Chambers St., New York

Received from the Jackson Hardware Company Seven Hundred and Twenty-five 25/100 Dollars in full of account.

H. J. Ashton,
Treasurer

The larger corporations, when dividends are to be paid, employ dividend checks (Form 156), which when properly indorsed and deposited, are usually regarded as all sufficient receipts. It is easy to devise some form of voucher check which will satisfactorily meet the situation.

If, however, formal receipts are desired, the following form will serve:

Form 162. Dividend Receipt

HOWARD FOUNDATION COMPANY

$25.00 BOSTON, MASS., October 1, 1917.

Received of the Howard Foundation Company Twenty-Five Dollars, payment in full of the regular quarterly dividend of One and One-half Per Cent on the stock of said corporation standing in my name.

HENRY J. POLLOCK

This receipt is sent out with the dividend check to be signed and returned by the recipient. When payment of dividends is made at the office of the company or at the office of some specified trust company or bank, the parties receiving payment usually sign the dividend register and no other receipt is necessary.

Receipts for instalment payments on stock are given in Forms 15-18.

CORPORATE NOTES

A corporate note does not require to be sealed. It may be signed by any officer or officers properly authorized thereto. Such authority is usually conferred by by-law provisions or by resolution of the board of directors, but otherwise may be given by custom. For large amounts or special transactions outside the usual routine, the officer's authorization should always be specific and usually by resolution of the board of directors. In all such cases the treasurer should have a certified copy of the resolution.

The signature of a corporate note should always be the corporate signature. Any other signature may not only fail to bind the corporation, but has been held in some states to involve the official signing the note in a personal liability as its maker or indorser.

Form 163. Corporate Note—By President

$500.00 NEW YORK, October 1, 1917.

Ninety days after date the Hillman Dredging Company promises to pay to the order of Howard P. Hunt the sum of Five Hundred Dollars. Value Received.

HILLMAN DREDGING COMPANY,
By NATHANIEL POTTER,
President

Payable at
SEABOARD NATIONAL BANK,
New York

Form 164. Corporate Note—By Treasurer

$2,500.00 BOSTON, MASS., September 1, 1916.

Four months after date the Hanover Securities Company promises to pay to the order of James C. Bennett the sum of Twenty-Five Hundred Dollars, with interest from date until paid, at the rate of Six Per Cent per annum, at the Sedgwick National Bank of Boston.
Value Received.

HANOVER SECURITIES COMPANY,
No. 725 By WILLIAM CURTISS,
Due January 1, 1917. *Treasurer*

The preceding notes are in the simplest form. The corporate signature is affixed by one officer or by two as may be customary or required by by-law provision or directed by the board.

Form 165. Collateral Note—On Demand

COLLATERAL NOTE

$4,000.00 NEW YORK, N. Y., October 3, 1917.

ON DEMAND the Hanover Power Company promises to pay to the Seaboard National Bank of the City of New York, or order, at its Banking House, No. 18 Broadway, New York, N. Y., Four Thousand Dollars for value received, with interest at the rate of Six Per Cent (6%) per annum from the date hereof, said corporation having deposited with said Bank as collateral security for payment of this or any other liability or

liabilities of the undersigned to said Bank, due or to be due or which may be hereafter contracted or exist, the following property or securities, viz.: Sixty-five (65) Shares of the Preferred Stock of the United States Steel Corporation of the par value of One Hundred Dollars ($100) each, the certificate for said stock standing in the name of John H. Howard, Treasurer of the said Hanover Power Company, and being indorsed by him in blank on the back of said certificate.

The market value thereof is today $7,085.00, and full power and authority is hereby given to said Bank to sell, assign, and deliver the whole or any part thereof, or any substitutes therefor, or any additions thereto, at any Brokers' Board, or at public or private sale, at the option of said Bank or its assigns on the non-performance of this promise or the non-payment of any of the liabilities above mentioned, or at any time or times thereafter, without advertisement or notice, which are hereby expressly waived; and upon such sale the holder hereof may purchase the whole or any part of such securities discharged from any right of redemption, and after deducting all legal or other costs and expenses for collection, sale and delivery, shall apply the residue of the proceeds of such sale or sales so to be made to pay any, either, or all of said liabilities to said Bank or its assigns as said Bank or its assigns shall deem proper, returning the overplus, if any, to the undersigned. And the undersigned gives to said Bank a lien to secure this note and all said other liabilities now existing or hereafter arising, and whether at any time due or not, upon all property and securities of the undersigned now or hereafter deposited with or left in the possession of said Bank, either as collateral for any other obligation or otherwise, and also upon any balance at any time of the deposit account of the undersigned with said Bank. Other collaterals may be substituted or added from time to time with the bank's consent, all representations, conditions, and agreements as to original collaterals applying to those so substituted or added.

In Witness Whereof, the said corporation has hereunto affixed its corporate signature and seal, acting through its President and Treasurer duly authorized thereunto.

{ CORPORATE SEAL }

Hanover Power Company,
By John H. Henderson,
President
Harry F. Sinclair,
Treasurer

Another form of collateral note is as follows:

Form 166. Corporate Note—Collateral Security

Collateral Note

$10,000.00 New York, October 1, 1917.

Ninety days after date the Berwick Mercantile Company promises to pay to the order of the Guardian Trust Company of New York City, at No. 170 Broadway, New York City, the sum of Ten Thousand

Dollars, with interest from date until paid at the rate of Five Per Cent (5%) per annum, and the said Berwick Mercantile Company doth herewith deposit with the Guardian Trust Company as collateral security for the due payment of the foregoing promissory note, Two Hundred (200) Shares of its stock in one Certificate No. 325, said Certificate standing in the name of Mark Baldwin, Treasurer of the said Berwick Mercantile Company, and indorsed by him in blank.

And in the event that this note or the interest thereon shall not be paid when due, the said Berwick Mercantile Company hereby appoints and constitutes the said Guardian Trust Company its attorney in fact and irrevocably, with power of substitution, to sell at any time after this said note or any interest thereon is due and unpaid, with or without notice, and either at public or private sale, the whole or any part of said securities, the proceeds thereof to be applied to the payment of the said promissory note, any interest due thereon, and any commissions properly payable on the sales of said securities so sold, and any surplus remaining thereafter, either of cash or of the said securities to belong to and be subject to the order of the said Berwick Mercantile Company; and should said securities not bring the full amount of this present note, together with any interest accrued thereon, said Berwick Mercantile Company undertakes and agrees to pay the amount still due to the holder hereof on demand.

Should any such sale be made, the holder hereof shall directly or in the name of any other person, have the right to purchase the security aforesaid. In case the market value of the same shall decrease, the said Berwick Mercantile Company hereby promises and agrees to proportionately reduce the amount of its indebtedness hereunder, or otherwise increase the security in proportion to said decrease of value.

In Witness Whereof, the said Berwick Mercantile Company has caused its name to be subscribed hereunto by its President, and its duly attested seal to be affixed hereto by its Secretary, on the day and year first above written.

{ CORPORATE SEAL }

Berwick Mercantile Company,
By Henry S. Corbin,
President

Attest seal:

Amos C. Hallock,
Secretary

When the corporate officials are not expressly authorized to execute notes by due resolution deposited with the bank in whose favor the notes are drawn, a certified resolution evidencing their authority is usually required.

CHAPTER LXXXII

CERTIFICATIONS

The certifications so frequently required in corporate procedure are never made in the corporate name. Certificates and affidavits to corporate instruments are made over their own names by the officers directly interested or concerned. Acknowledgments are made for and on behalf of the corporation—but not in its name—by such corporate officials or agents as may be prescribed by statute or be authorized thereto by the by-laws or resolutions of the board.

Form 167. Certificate to Service of Notice

I, the undersigned, Secretary of the Atlantic Machine Works, do hereby certify that in accordance with the by-law requirements of said Company, a copy of the foregoing notice, properly enclosed and directed, and with postage prepaid, was by me on the 3rd day of October, 1917, mailed to each stockholder of record of said Company at his address as it appeared on the books of the Company.

HENRY H. LINDEN

New York City,
October 15, 1917.

This certificate usually appears on the same sheet with, and below a copy of, the notice, though sometimes written separately and attached to a copy of the notice. In this latter case the wording of the certificate must be changed to correspond with the facts.

An affidavit, as in the case of the certification, may appear on the same sheet as the copy of the notice, or be attached thereto.

Form 168. Affidavit to Service of Notice

STATE OF NEW YORK }
COUNTY OF NEW YORK } *ss.:*

On this 15th day of October, 1917, before me personally appeared Henry H. Linden, Secretary of the Atlantic Machine Works, who being duly sworn, did depose and say that on the 3rd day of October, 1917, a copy of the attached notice of meeting, properly enclosed and directed and with postage prepaid, was by him mailed to each stockholder of record of said corporation at his address as shown by the books of the Company.

HENRY H. LINDEN

Sworn to and subscribed before me
the day and year aforesaid.

JOHN H. ANDERSON,
Notary Public
County of New York,
No. 16

{ CORPORATE SEAL }

The best evidence of notice by publication is furnished by complete copies of the papers in which the notice appeared. When these are supplied, no certification as to publication of the notice is usually required. If, however, the notice is clipped from the paper and so preserved, an affidavit is sometimes considered desirable. The larger city papers furnish affidavits on request for notices published in their columns.

Form 169. Affidavit to Publication of Notice by Secretary

AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } *ss.:*

On this 15th day of October, 1917, before me personally appeared Henry H. Linden, Secretary of the Atlantic Machine Works, who being duly sworn, did depose and say that the annexed notice was published in the *New York Times* on the 3rd and 10th days of October, 1917.

HENRY H. LINDEN

Sworn to and subscribed before me
the day and year aforesaid.

JOHN H. ANDERSON,
Notary Public
County of New York,
No. 16

{ NOTARIAL SEAL }

In the following form of certified resolution the resolution appears on the upper part of the sheet followed by the certification, the general arrangement being the same as in Form 175:

Form 170. Certified Resolution Designating Bank

(For Resolution see Form 87.)

I, Sherman H. Rogers, Secretary of the Allis Drug Company, do hereby certify that the foregoing is a full and true transcript of a resolution duly adopted at a regular meeting of the Board of Directors of the said Company held in the City of New York on the 10th day of November, 1917, as it appears on the minutes of said meeting, and I do further certify that Charles Allis is the duly elected President of said Company, and Jasper T. Huntington is its duly elected Treasurer.

IN WITNESS WHEREOF, I have hereunto affixed my official signature and the corporate seal of said Company, this 25th day of November, 1917.

SHERMAN H. ROGERS,
Secretary

{ CORPORATE SEAL }

The following certification is employed in connection with the resolution given in Form 88:

Form 171. Certification of Resolution Designating Bank

I, John H. Farwell, Assistant Secretary of the Standard Milling Company, do hereby certify that the foregoing resolution was duly adopted at a regular meeting of the Board of Directors of said Company held on Tuesday, November 10, 1917, in the office of the Company, 225 Fifth Avenue, New York, all as shown by the minutes of said meeting, and that the transcript of Section 3, Article VII of the By-laws of said Company appearing in the preamble of said resolution is a true and accurate transcript thereof from the duly adopted By-laws of the Company, and I do further certify that Henry F. Farrand is the duly elected Treasurer of said Company and Howard C. Malcolm is its duly elected President.

Witness my official signature and the corporate seal of said Company, this 18th day of November, 1917.

JOHN H. FARWELL,
Assistant Secretary

{ CORPORATE SEAL }

If the bank requires certified signatures of the signing officials, these signatures might be written on the same sheet between the resolution and certification, and the following phrase be added to the certification: "and that the signatures above written are respectively the signatures of the said Henry F. Farrand and Howard C. Malcolm."

A different form of certification employed in connection with the resolution of Form 89 is as follows:

Form 172. Certification of Resolution

The undersigned, Secretary of the American Textile Company, does hereby certify that the foregoing resolution was duly adopted on the 10th day of December, 1917, at a meeting of the Board of Directors of said Company regularly called and duly constituted and at which a quorum was present.

Witness my hand and the seal of said corporation this 12th day of December, 1917.

ALFRED DILWORTH,
Secretary

{ CORPORATE SEAL }

Form 173. Certificate of Election of Treasurer

I, Horace B. Elkins, Secretary of the Ellwood Creamery Company, hereby certify that at a regular and duly constituted meeting of the Board of Directors of said Company held in the City of Albany on the 1st day of December, 1917, Henry Howells was elected Treasurer of said Company to fill the vacancy in said office caused by the death of J. J. McAllen, and that the said Henry Howells is now the duly qualified and authorized Treasurer of the said Ellwood Creamery Company.

Witness my hand and the seal of the Company this 10th day of December, 1917.

HORACE B. ELKINS,
Secretary

{ CORPORATE SEAL }

The following certificate of the election of corporate officials may be used when greater formality is desired.

Form 174. Certificate of Election of Officers

I, Emory Hardin, Secretary of the Dyett-King Leather Company, do hereby certify that the directors of said Company being duly assembled in lawful meeting in the office of the Company, No. 75 Dey St., New York City, on the 9th day of November, 1917, and a quorum being present, did then and there elect Frederick Myers President and Walter C. Jackson Treasurer of said corporation, to serve for the ensuing year and until the due election and qualification of their successors, and that Frederick Myers and Walter C. Jackson are now duly and fully qualified and empowered to act for said corporation in their respective official capacities.

In Testimony Whereof, I have hereunto affixed my official signature and the corporate seal of said Company this 15th day of November, 1917.

Emory Hardin,
Secretary

{ CORPORATE SEAL }

Forms for certifications of transcripts are given below:

Form 175. Certification of Transcript from By-Laws

CONSOLIDATED CRACKER COMPANY

Transcript from By-Laws

"Article IV—Officers

"Sec. 2. *The President*

"The President when present shall preside at all meetings of the stockholders and of the Board of Directors; shall sign all certificates of stock; shall sign or countersign as may be necessary all such bills, notes, checks, drafts, and other instruments as may pertain to the ordinary course of the Company's business, and shall sign when duly authorized thereto all contracts, orders, deeds, licenses, and other instruments of a special nature.

"He may also in the absence or disability of the Treasurer, indorse checks, drafts, and other negotiable instruments for deposit or collection, and shall with the Secretary sign the minutes of all meetings over which he presides."

I, James T. Howard, Secretary of the Consolidated Cracker Company, do hereby certify that the above is a true and correct copy of Section 2, Article IV of the duly adopted by-laws of this Company, and in testimony thereof I have hereunto affixed my official signature and the seal of the Company, in the City of Brooklyn, on this 21st day of November, 1917.

James T. Howard,
Secretary

{ CORPORATE SEAL }

Form 176. Certification of Transcript from Minutes

WESTON MANUFACTURING CORPORATION

TRANSCRIPT FROM MINUTES OF
REGULAR MEETING OF DIRECTORS
Held September 15, 1917

(Transcript from minutes appears here.)

I, the undersigned, Secretary of the Weston Manufacturing Corporation, do hereby certify that the above and foregoing is a true and accurate transcript from the minutes of a regular meeting of the Board of Directors of said Company held in the office of the Company on the 15th day of September, 1917, and recorded on pages 85 to 87 of the Minute Book of said Company.

Witness my hand and seal of the Company this 14th day of November, 1917.

HORACE POTTER,
Secretary

{ CORPORATE SEAL }

The president occasionally joins with the secretary in the certification of any specially important transcript. In such case the certificate is changed as follows:

Form 177. Certification of Minutes—President and Secretary

We, the undersigned, President and Secretary respectively of the Weston Manufacturing Corporation, do hereby certify that the above and foregoing is a true and accurate transcript from the minutes of a regular meeting of the Board of Directors of said Company held in the office of the Company on the 15th day of September, 1917, and recorded on pages 85 to 87 of the Minute Book of said Company.

IN WITNESS WHEREOF, we have hereunto affixed our official signatures and the seal of the Company in the City of New York on this 14th day of November, 1917.

HENRY J. RANDALL,
President

HORACE POTTER,
Secretary

{ CORPORATE SEAL }

Affidavits take the place of the secretary's certificate when corporate records or transcripts therefrom are required for use in legal proceedings.

Form 178. Secretary's Affidavit to Minutes

STATE OF NEW YORK }
COUNTY OF NEW YORK } *ss.:*

On this 14th day of November, 1917, before me personally appeared Horace Potter, who being duly sworn, did depose and say that he is the Secretary of the Weston Manufacturing Corporation; that he was present at the regular meeting of the Directors of that Company held on the 15th day of September, 1917, that he recorded the proceedings of said meeting in the Minute Book of the corporation, and that the above and foregoing is a true and correct transcript from the minutes so recorded.

HORACE POTTER

Sworn to and subscribed before me
on the day and year above stated.

(Notarial signature and seal.)

Notarial exemplifications of certified transcripts from the corporate records are sometimes required as illustrated by the following form.

Form 179. Notarial Exemplification of Minutes

STATE OF NEW YORK }
COUNTY OF NEW YORK } *ss.:*

Personally appeared before me this 20th day of November, 1917, Horace Potter, to me well known, and acknowledged that he signed the foregoing certification of a transcript from the minutes of the Weston Manufacturing Corporation, and affixed the seal of said Company thereto as Secretary of the said Company for the purposes therein set forth, and I have personally examined the minutes of said Company under date of September 15, 1917, and certify that the foregoing transcript is correctly transcribed therefrom.

MORRIS MANNING,
Notary Public for
County of New York,
No. 765

{ NOTARIAL SEAL }

Term expires December 1, 1918.

The treasurer's certifications to matters relating to the corporation's finances are usually in the form of affidavits. The affidavit should follow the statement on the same sheet or on the last sheet if the statement extends over several pages.

Form 180. Treasurer's Affidavit to Corporate Statement

STATE OF NEW YORK }
COUNTY OF NEW YORK } *ss.:*

On this 19th day of October, 1917, personally appeared before me, a Notary Public in and for the County of New York, Walter L. Hood, Treasurer of the Hood Scale Company, who, being duly sworn, did depose and say that he has full charge and control of the books and accounts of the said Company; that the above and foregoing statement is taken from said books and accounts; that it is a true and accurate transcript therefrom, and that to the best of his knowledge and belief it is a just and correct presentation of the financial condition of said Company on this date.

WALTER L. HOOD

Sworn to before me the
day and year aforesaid.

JAMES H. STEELE,
{ NOTARIAL SEAL } *Notary Public for*
..... *New York County,*
No. 994

Term expires Feb. 15, 1919.

When the corporate acknowledgments are taken, the notary should not be an officer or stockholder of the corporation. The form of acknowledgment is usually regulated by statute and therefore varies in almost every state of the Union. The following form of corporate acknowledgment is that prescribed by the statutes of New York.

Form 181. Notarial Acknowledgment—New York

STATE OF NEW YORK }
COUNTY OF NEW YORK } *ss.:*

On this 16th day of November in the year 1917 before me personally came John J. Kerry, to me known, who, being by me duly sworn, did depose and say that he resided in the City of New York; that he is the President of the Kerry Machine Works, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

JOHN J. KERRY

Sworn to before me the
day and year aforesaid.

(Notarial signature and seal)

CHAPTER LXXXIII

POWERS OF ATTORNEY, CONTRACTS, AND ASSIGNMENTS

Powers of Attorney

The execution of a power of attorney varies according to the powers conveyed and the conditions under which it is given. The instrument which follows does not require acknowledgment when the parties are known to the corporate officials. If otherwise acknowledgment is usually required. (See Forms 131, 132.)

Form 182. Power of Attorney—To Receive Dividends

Power of Attorney

I, the undersigned, do hereby constitute and appoint George H. Williams of New York City, my true and lawful attorney, for me and in my place and stead to receive any and all dividends that may be declared upon Fifty Shares of Preferred Stock of the Howard Bank Note Company now standing in my name on the books of said Company, and to receipt for the same, and to do all other things that may be necessary to carry into effect the intent of this power of attorney; and I hereby ratify and confirm all that my said attorney may properly do by virtue of the authority herein conferred.

In Witness Whereof, I have hereunto affixed my signature and seal this 7th day of December, 1917.

George H. Lane [L. S.]

Witnessed by
Howard Lansing

A corporate power of attorney differs from the ordinary form only in those details directly incident to its corporate origin.

Form 183. Power of Attorney—To Collect Money

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS:

That the Tucson Cattle Company, a corporation duly organized under the laws of Arizona, does hereby make, constitute, and appoint Howard H. McComb of the State of New York, its true and lawful attorney, for it and in its name, place, and stead to collect and receive from the New York Drovers' Association of New York City the sum of Three Thousand Dollars ($3.000) with interest thereon at the legal rate from the 1st day of January, 1917, said amount being due and payable to the Tucson Cattle Company for and on account of cattle shipped the said New York Drovers' Association during the month of December, 1916, and the said Howard H. McComb is hereby fully authorized and empowered for and on account of the said Tucson Cattle Company and in its name, to collect, receive, and receipt for the said Three Thousand Dollars ($3.000), and the interest thereon as aforesaid, in whole or in part, but without prejudice to any portion thereof unpaid, and to incur and pay on behalf of the said Tucson Cattle Company all reasonable expenses incident to the collection of said amount, including all proper costs of any suit or other legal proceedings necessary thereto, and generally to do all such other things in connection therewith as may be necessary and proper in the premises.

IN WITNESS WHEREOF, the said Tucson Cattle Company has caused its corporate name to be signed hereunto by its President and its corporate seal to be affixed and attested by its Secretary, all being done in the City of Tucson, Arizona, on this the 2nd day of July, 1917.

{ CORPORATE SEAL }

TUCSON CATTLE COMPANY,
By GEORGE M. PRICE,
President

Attest Seal:
WILSON M. BURNEY,
Secretary

The foregoing power of attorney would usually be acknowledged in order to give it greater weight and more ready recognition.

Form 184. Power of Attorney—To Make Delivery of Deed

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS:

That the Albany Flouring Mills, a corporation duly organized under the laws of the State of New York, and having its principal office and

place of business in Albany, New York, has made, constituted, and appointed and by these presents does make, constitute, and appoint, George H. McCall of Philadelphia, Pennsylvania, its true and lawful attorney, for it and its name and stead, to deliver to the Adams Foundation Company of Philadelphia, Pennsylvania, a certain deed duly executed by the said Albany Flouring Mills and transferring to the said Adams Foundation Company the property therein described at Nos. 1534, 1536, and 1538 West Side Avenue, Philadelphia, and to receive payment for the property transferred by said deed, and the said George H. McCall is hereby fully authorized and empowered for and on behalf of this Company to make good and valid delivery of the said deed and to receive from the said Adams Foundation Company the sum of Nineteen Thousand, Two Hundred and Fifty Dollars ($19,250) in cash, payment for the property transferred by said deed, and to receipt for said payment, and to do all such other things as may be necessary and proper in the premises.

In Witness Whereof, the said Albany Flouring Mills has caused its corporate seal to be affixed hereunto by its Secretary and its name to be subscribed hereto by its President, all being done in the City of Albany, and State of New York, on this first day of June, 1917.

{ CORPORATE SEAL }

Albany Flouring Mills,
By Jesse H. Blanchard,
President

Attest Seal:

Julian Hurndon,
Secretary

A power of attorney should either be accompanied by a certified copy of the resolution by which it was authorized, or otherwise be acknowledged.

The power of attorney which follows authorizes the sale of land and the execution and delivery of the deeds, and therefore requires the same formal execution as a deed. Without this it is ineffective. The form of execution must comply with the law of the state in which the land is located.

Form 185. Power of Attorney—To Manage, Sell, and Deed Land

Power of Attorney

Know All Men by These Presents:

That the Berwell Investment Company, a corporation duly organized and existing under and by virtue of the laws of the State of New York,

and having its office and principal place of business at No. 30 Broad Street, in the City of New York, has made, constituted, and appointed, and by these presents does make, constitute, and appoint, Horace M. Maxwell of Houston, Texas, its true and lawful attorney, for it and in its name, place, and stead to bond, grant, bargain, sell, contract, lease, exchange, give options on, sell timber from, sell or lease oil, coal or other mineral rights in or on, or handle or dispose of in such other way as may by him be deemed advantageous and advisable, and for such consideration and on such terms as he may approve, and in whole or in part, that certain tract or parcel of land, owned by said Berwell Investment Company, in Brazos County, Texas, consisting of the east half of the league of land known as the J. J. Oliver League, and containing Two Thousand Two Hundred and Fourteen Acres (2,214), more or less, said land being part of the Headright granted to J. J. Oliver by the Mexican Government and surveyed by the County Surveyor in 1838, and conveyed to the Berwell Investment Company by deed from the said J. J. Oliver, dated July 1, 1856, and recorded in the office of the County Clerk of Brazos County, D. B. 15, page 225; and the said Berwell Investment Company grants to its said attorney full power and authority to collect and receive for said Company all rents, royalties, and other considerations or payments derived from the said property in any way; and for the said Berwell Investment Company and in its name and stead, either alone or jointly with others, as may be requisite and necessary, to make, execute, acknowledge, and deliver good and sufficient deeds, conveyances, option contracts or leases for the said property, or for any parts thereof, or for any rights therein or thereon, giving and granting its said attorney full power and authority to do and perform any and every act and thing whatsoever requisite and necessary to be done in the premises, the said Company hereby ratifying and confirming all that its said attorney shall lawfully do or cause to be done by virtue of this present indenture.

In Witness Whereof, the said Berwell Investment Company has caused its corporate name to be signed by its President and its corporate seal to be affixed by its Secretary, all being done in the City of New York on this the 18th day of August, 1917.

{ CORPORATE SEAL }

Berwell Investment Company,
By James Warren,
President

Attest Seal:
Willis Baker,
Secretary

This instrument is sweeping, giving the agent practically every power over the lands affected that the company has itself. The acknowledgment must in this case follow the Texas form.

When a corporate power of attorney is given for some special act, it expires automatically as soon as that act is

performed. When, however, it is desired to terminate the powers prior thereto, or where the power is a continuing one, a formal revocation is necessary. Notice of this revocation should be sent to the parties directly interested, and, in case of a general power of attorney, should also be published.

Form 186. Revocation of Power of Attorney

KNOW ALL MEN BY THESE PRESENTS:

That the Berwell Investment Company, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and having its office and principal place of business at No. 30 Broad Street in the City of New York, has for good cause and consideration revoked, recalled, annulled, and made void, and by these presents does revoke, recall, annul, and make void a certain power of attorney given under date of August 18, 1917, under the corporate signature and seal, to Horace M. Maxwell of Houston, Texas, and does hereby withdraw, deny, and cancel any and all powers and authorities whatsoever therein expressed and conveyed.

IN WITNESS WHEREOF, the said Berwell Investment Company has caused its corporate signature and seal to be hereunto affixed by its President and Secretary in the City of New York on this 19th day of September, 1917.

{ CORPORATE SEAL }

BERWELL INVESTMENT COMPANY,
By JAMES WARREN,
President
WILLIS BAKER,
Secretary

CORPORATE CONTRACTS

Corporate contracts differ in nowise from contracts between individuals, save in the verbiage necessary to adapt them to the corporate form. The forms which follow are included merely to illustrate this adaptation.

Form 187. Corporate Contract

CONTRACT

AN AGREEMENT, made and entered into this 25th day of November, A. D. 1917, by and between the Atlas Lithographing Company, a corpora-

tion duly organized under the laws of the State of Maine and having its usual place of business in Boston, Massachusetts, party of the first part, and the Selby Lithographing Company, a corporation organized under the laws of the State of New York, and having its principal office and place of business at No. 20 Broad Street in the City of New York, party of the second part.

For and in consideration of the sum of One Dollar and of other valuable considerations passing between the parties hereto, the receipt whereof is hereby respectively acknowledged, it is agreed as follows:

1. That the said party of the first part shall employ one John H. Bernard of Boston, Massachusetts, for account of both the parties hereunto, to work upon and perfect as far as may be, a certain improvement in lithography known as the "Silver Plate Process," said process being now the joint property of the said parties to this present agreement.

2. That said party of the first part shall pay the said John H. Bernard a monthly salary not exceeding Three Hundred Dollars ($300) and shall also furnish such materials, supplies, and assistance as the said John H. Bernard may reasonably require in the progress of his work.

3. That at the end of each quarter said party of the first part shall render a statement of the expenses incurred by reason of the employment of the said John H. Bernard for the perfection of the said Silver Plate Process, and said party of the second part shall within ten days of the receipt of said statement remit one-half thereof to the said party of the first part.

4. That all improvements in said Silver Plate Process or in connection therewith that may be made or discovered by the said John H. Bernard, shall be the joint and equal property of the two parties to this present agreement, and patents therefor shall be taken out in the names of the said parties of this present agreement and at their joint expense.

5. That said employment of said John H. Bernard shall continue for one year from date, unless sooner terminated by mutual agreement or by circumstances beyond the control of the parties hereto.

(*Testimonium and signatures as in Form* 148.)

This agreement might or might not be acknowledged at the discretion of the parties. The contract as executed is legally sufficient. The only advantage to be gained by an acknowledgment is the greater ease of proving the authenticity and due execution of the instrument in case of litigation.

Form 188. Corporate Bill of Sale

BILL OF SALE

KNOW ALL MEN BY THESE PRESENTS:

That the Standard Laundry Machine Company, a corporation duly organized under the laws of the State of New York, with its principal

office and place of business at No. 50 Dey St., in the City of New York, in consideration of the sum of One Thousand Dollars to it paid by the Clipper Laundry Company of No. 71 East 21st St., New York City, the receipt whereof is hereby acknowledged, does hereby sell, transfer, and assign to the said Clipper Laundry Company the following goods and chattels, viz.:

All of the laundry machinery, tools, and apparatus of every kind now in the premises at No. 365 West 19th St., formerly occupied by the Union Laundry Company, all as set forth and specified in the annexed schedule; to have and to hold all and singular the said goods and chattels to the said Clipper Laundry Company, its successors and assigns to their own use and behoof forever, and the said Standard Laundry Machine Company does hereby covenant with the said grantee that the said Standard Laundry Machine Company is the lawful owner of said goods and chattels; that they are free from all liens; that it has good right to sell the same as aforesaid; and that it will warrant and defend the same against the lawful claims and demands of all persons.

In Witness Whereof, the said Standard Laundry Machine Company has caused its corporate name to be signed hereunto by its President, and its corporate seal to be affixed and duly attested by its Secretary, said corporate seal being affixed both to these presents and to the schedule hereunto annexed, all being done in the City of New York, on this 10th day of May, 1917.

(*Signature and attested seal as in Form* 191.)

The inventory or schedule of the goods conveyed by this bill of sale should be attached to it, and, in accordance with the provisions of the conveyance, be identified by the duly attested seal of the company.

Assignments

Form 189. Assignment of Contract

Assignment

Know All Men by These Presents:

That for and in consideration of the payment by the Connecticut Valley Paper Mills, a corporation organized under the laws of the State of Connecticut and having its principal office and place of business at 525 Main Street, New Haven, Connecticut, of Twenty-five Thousand, Seven Hundred and Forty-five Dollars ($25,745) to the Holden Chemical Company, a corporation duly organized under the laws of the State of New York and having its principal office and place of business at 152 Warren Street, New York City, the receipt of which payment is by the last-named

corporation hereby acknowledged, said Holden Chemical Company does hereby assign, transfer, and convey to the said Connecticut Valley Paper Mills, all and singular, its right, title, and interest of every kind in and to a certain contract (copy of which is hereunto annexed and made part of this present instrument) entered into on the 31st day of July, 1916, between Martin S. Coleman of Brooklyn, New York, and the said Holden Chemical Company, said contract vesting in the said last-named company, its successors and assigns, under the conditions set forth in said contract, the exclusive right to acquire and use all the inventions and processes that may hereafter be made, discovered, or devised by the said Coleman for the manufacture of paper or to be used in connection therewith, said contract being conveyed to and accepted by the said Connecticut Valley Paper Mills with all its rights, privileges, and obligations as herein set forth and as hereunto held by the said Holden Chemical Company.

IN WITNESS WHEREOF, the said Holden Chemical Company has hereunto caused its corporate name and seal to be affixed by its President and Secretary, all being done in the City, County, and State of New York, on this 28th day of July, 1917.

{ CORPORATE SEAL }

HOLDEN CHEMICAL COMPANY,
By JAMES HOLDEN,
President
HAROLD SHELDON,
Secretary

Acknowledgment is not essential to this assignment but is advisable. The instrument as given does not relieve the assigning company from liability under the assigned contract. To secure this, a specific release from the other party to the assigned contract is essential. A simple form of release to follow, or be attached to, the foregoing contract is as follows:

Form 190. Assent to Assignment of Contract

I, Martin S. Coleman of Brooklyn, New York, party of the first part to a certain contract entered into on the 31st day of July, 1916, with the Holden Chemical Company of New York City, do for good and valuable considerations, the receipt of which is hereby acknowledged, consent and agree to the transfer of said contract to the Connecticut Valley Paper Mills as set forth in the foregoing assignment, and to the substitution of the said Connecticut Valley Paper Mills for the Holden Chemical Company in said contract, and do hereby release, relieve, and discharge the said Holden Chemical Company from any claim, liability, or other obligation for, on account of or by reason of said contract.

Witness my hand and seal this 28th day of July, 1917.

MARTIN S. COLEMAN [L. S.]

The assignment of contract which follows is informal but sufficient where the whole transaction is well understood. In practice it is usually indorsed on the back of the contract to be assigned, or, with the word "within" changed to "above and foregoing," is placed on the last page of the contract.

Form 191. Assignment of Contract—Indorsement Form

For and in consideration of One Dollar and of other sufficient considerations, the receipt of all which is hereby acknowledged, the Sterling Power Company does hereby sell, assign, and transfer to the Cohoes Light and Power Company the within contract with all the rights, privileges, obligations, and undertakings thereof as therein set forth.

In Witness Whereof, the signature and the attested seal of the said Sterling Power Company are hereunto affixed by its duly authorized officers this 16th day of May, 1917.

{ CORPORATE SEAL }

Sterling Power Company,
By Miller Sterling,
President

Attest Seal:
Henry Welling,
Secretary

The patent assignment which follows is in general accord with the forms approved by the Patent Office.

Form 192. Assignment of Patent—Individual to Corporation

Assignment of Patent

Whereas, I, Alan Hudson, of Newburgh, County of Orange, State of New York, did obtain letters patent of the United States for an improvement in Car Couplings, which letters patent are numbered 605,948, and bear date the 6th day of November in the year 1916; and

Whereas, I am now the sole owner of said patent, and of all rights under the same; and

Whereas, The Montauk Car Coupler Company, a corporation duly organized under the laws of the State of New Jersey, and having its principal office and place of business at No. 15 Exchange Place, Jersey City, New Jersey, is desirous of acquiring the entire interest in the same together with all claims for profits and damages arising from past infringements thereof, and the right to sue for and recover in its own name on all claims for such infringements:

Now, Therefore, To all whom it may concern, be it known, that for

and in consideration of the issue to my order by the said Montauk Car Coupler Company of its entire capital stock, excepting Ten (10) Shares heretofore issued to the incorporators of said Company, the receipt of which aforesaid stock, amounting to Ninety-nine Thousand Dollars ($99,000), is hereby acknowledged, I, the said Alan Hudson, have sold, assigned, and transferred, and by these presents do sell, assign, and transfer, unto the said Montauk Car Coupler Company, the whole right, title, and interest for the United States, its colonies, and dependencies, in and to the said improvement in car couplings, and in and to the letters patent therefor aforesaid; and the inventions covered thereby, together with all claims for profits and damages arising from past infringements of the said letters patent, and the right to sue and recover, in its own name, on all claims for such infringements, the same to be held and enjoyed by the said Montauk Car Coupling Company for its own use and behoof, and for the uses and behoof of its legal representatives, successors, and assigns, to the end of the term for which said letters patent are or may be granted, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made.

In Testimony Whereof, I have hereunto set my hand and affixed my seal at Newburgh, County of Orange, State of New York, this 4th day of May, 1917.

Alan Hudson [L. S.]

In presence of
Jacob Ellis
Hendrick N. Enslow

An assignment of patent does not require notarial acknowledgment under the rules of the Patent Office, but, as an acknowledgment, as already stated, is *prima facie* evidence of the due execution of the instrument, it is usually affixed.

CHAPTER LXXXIV

INSTALMENT AND DIVIDEND BOOKS

The instalment scrip or instalment certificate book is a book of blank instalment certificates (Forms 17, 18) attached to the proper stubs, the whole book being similar in plan and arrangement to the stock certificate book. The scrip or certificates of this book are issued as instalments are paid on stock subscriptions in evidence thereof. When all the instalments are paid and the regular stock certificates are issued to the subscribers, these receipts are surrendered to the secretary and are by him cancelled and pasted to their proper stubs in the instalment scrip book.

The instalment book is a book in which a record is kept of each instalment due on subscriptions when subscriptions are so payable. The arrangement and manner of keeping this book are as follows:

Form 193. Instalment Book

INSTALMENT BOOK

Instalment No. 3 of 10 per cent. Due May 1, 1917.

Subscribers' Names		Shares	Amount	Interest	Paid	When Paid
Abbott, John		75	$750.00	....	$750.00	May 1
Benton, William H.		50	500.00	$1.25	501.25	May 15
Brown, Howard		60	600.00	....	600.00	April 27

The purpose of the instalment book is to record each instalment of subscriptions as it becomes due. Accordingly the page or pages on which an instalment is entered must be headed in accordance with the facts. In the first column appear the subscribers' names arranged alphabetically. The second column is intended for the ledger folio which need be entered only when, as is the case in some states, instalment payments must be posted to the stock ledger. The third column gives the number of shares subscribed for; the fourth column the amount of the particular instalment; the fifth column any interest due in case payment of the instalment is delinquent; the sixth column the amount paid; and the seventh the date of payment. An additional column is sometimes added for comments.

The cash received on instalment payments will also appear on the stubs of the instalment scrip book as the certificates are issued, and the footing of column six of the stock instalment book should therefore agree with the sum of the similar payments shown on the stubs of the instalment scrip book.

The dividend book contains for each dividend declared, a list of the stockholders with their respective stockholdings, the amount due each, the date of its payment, and finally the stockholder's receipt therefor. In the larger corporations and in many of the smaller ones, the book is not kept at all, dividend checks and vouchers taking its place.

Usually the dividend book is employed only when stockholders are required to call in person and receive and receipt for dividends. Each dividend as declared is recorded on one or more pages, a statement of the facts appearing at the head of the pages of the particular record. The form is simple and its method obvious. Stockholders' names are arranged alphabetically, and the signatures appearing in the last column serve as a receipt for the dividend payment. A signature

by an attorney, as in the second example, is not sufficient unless authorized by due power of attorney filed with the treasurer of the company. (See Form 182.)

Form 194. Dividend Book

DIVIDEND BOOK

Dividend No. 5 of 2%. Declared November 1, 1917. Payable December 15, 1917, to Stockholders who appear of record December 1, 1917.

Stockholders' Names	Shares	Amount	Paid	Received by
Alsop, John H.	50	$100.00	Dec. 18	John H. Alsop
Barrington, Harvey	25	50.00	Dec. 15	Howard Jones, Atty.

CHAPTER LXXXV

BONDS OF INDEMNITY

Treasurer's Bond

The treasurer's bond is the formal undertaking of parties named therein and by whom the bond is signed, that in event of loss arising from specified acts, failures, or omissions on the part of the treasurer, they will make good the loss up to the amount of the bond. Formerly bonds of this nature were almost invariably signed by the treasurer and his friends. Of recent years, however, surety company bonds have largely superseded these personal bonds.

The following is a common form of treasurer's personal bond.

Form 195. Treasurer's Bond—Personal

Treasurer's Bond

Know All Men by These Presents:

That we, Robert A. Bruce of New York City, as principal, and William H. Cain of Newark, New Jersey, and H. B. McMillan of Brooklyn, New York, as sureties, are held and firmly bound unto the Sterling Transportation Company, a corporation duly organized under the laws of the State of New York, in the sum of Ten Thousand Dollars ($10,000), to the payment of which to the said corporation, its successors, or assigns, we do by these presents jointly and severally bind ourselves, our heirs, executors, and administrators.

Signed and sealed this 15th day of August, 1917.

The condition of the above obligation is that:

Whereas, The said Robert A. Bruce has been elected Treasurer of the said Sterling Transportation Company for the period of one year from the 10th day of August, 1917, and may hereafter be re-elected to or continue in such office for a further period:

Now, Therefore, If the said Robert A. Bruce shall hereafter in all respects fully, faithfully, and honestly perform and discharge the duties of

said office so long as he shall continue therein, both during the term for which he has been elected and during such further time as he may continue therein, whether by re-election or otherwise, and shall when properly so required, fully and faithfully account to the said corporation, its successors, or assigns, for all moneys, goods, and properties whatsoever, for or with which the said Robert A. Bruce may in anywise be accountable or beholden to the said corporation, and if at the expiration of his term of or continuance in office, or prior thereto in the event of his death, resignation, or removal from office, all books, papers, vouchers, money, and other property of whatever kind placed in his custody as Treasurer of said corporation, shall be forthwith restored to the said corporation, its successors, or assigns, then this obligation shall be void, but otherwise to remain in full force and effect.

ROBERT A. BRUCE [L. S.]
WILLIAM H. CAIN [L. S.]
H. B. MCMILLAN [L. S.]

Signed, sealed and delivered
in the presence of
JOHN J. BARR
W. H. CARPENTER

The treasurer's bond must be given under seal, and, while not legally necessary, personal bonds are usually acknowledged.

Personal bonds are usually sweeping in their nature, covering any and all losses arising through any errors, misdeeds, or omissions of the treasurer. When, however, a surety company enters the bonding field, the guarantees are reduced to the lowest possible terms—usually to losses arising through the personal dishonesty of the employee amounting to "larceny or embezzlement." The forms for these bonds are furnished by the surety companies and vary according to the company and the conditions. The general form employed is too lengthy for reproduction in the present volume.

BOND FOR LOST STOCK CERTIFICATE

When a stock certificate is lost or destroyed, a bond of indemnity is usually required before the corporate authorities will undertake to replace the lost stock certificate. (See also § 181.)

Form 196. Indemnity Bond for Lost Stock Certificate

INDEMNITY BOND

KNOW ALL MEN BY THESE PRESENTS:

That we, John R. McAllister of Yonkers, New York, as principal, and Charles Foster and Henry H. Clark, both also of Yonkers, New York, as sureties, are held and firmly bound unto the Sterling Transportation Company, a corporation duly organized under the laws of the State of New York, in the sum of Five Thousand Dollars ($5,000), to the payment of which to the said corporation, its successors or assigns, we do by these presents jointly and severally bind ourselves, our heirs, executors and administrators.

Signed and sealed this 18th day of May, 1917.

The condition of the foregoing obligation is that:

WHEREAS, The said John R. McAllister is the owner of record, as shown by the stock book of the corporation, of Forty (40) Shares of the Common Capital Stock of the said Sterling Transportation Company, each of the par value of One Hundred Dollars ($100), the ownership of said stock being further evidenced by Certificate No. 375 issued in the name of the said John R. McAllister on the 15th day of August, 1916; and

WHEREAS, The said John R. McAllister has made application to the Board of Directors of the Sterling Transportation Company for the issue in his name of a new certificate for the said Forty (40) Shares of stock of the said Company, alleging that original Certificate No. 375 is lost, stolen, or destroyed and that its present whereabouts and condition are unknown to him; and

WHEREAS, By due and formal resolution of the said Board of Directors, said application has been granted and a new certificate for said Forty (40) Shares of the stock of the said Sterling Transportation Company has this day been issued to the said John R. McAllister:

NOW, THEREFORE, If the said John R. McAllister, his heirs, executors, and administrators, or any of them, do and shall at all times hereafter, save, defend, and indemnify the said Sterling Transportation Company, its legal successors or assigns, of, from and against all demands, claims, or causes of action arising from or on account of the loss of said Certificate No. 375 for Forty (40) Shares of the Common Capital Stock of said Company and the issue of said new certificate in place thereof, and of and from all costs, damages, and expenses that shall or may arise because of said reissue, and shall also deliver or cause to be delivered up to the said Sterling Transportation Company for cancellation the said missing Certificate No. 375 whenever and so soon as the same shall be found or recovered, or come into his possession, then this obligation shall be void; otherwise to remain in full force and effect.

JOHN R. MCALLISTER [L.S.]
CHARLES FOSTER [L.S.]
HENRY H. CLARK [L.S.]

Signed, sealed and delivered
in the presence of
DANIEL T. BAIRD
JOHN K. STONE

CHAPTER LXXXVI

THE CORPORATE CALENDAR

The corporate calendar is an orderly statement of the important corporate formalities that must be attended to at fixed periods, so arranged that the secretary may at any time by a mere glance see just what corporate duties require his attention.

The amount of detail entered on the corporate calendar will vary according to the preference of the particular secretary, from a mere skeleton outline of the reports and notices required by the statutes and by-laws, to a fairly complete digest of corporate procedure. It is advantageous to enter reasonably full details, as much subsequent research may thereby be avoided.

The corporate calendar is frequently entered in the minute book. More conveniently it is prepared on a special card or cards, or on a desk calendar, in either case so placed or hung that it is plainly in sight. Or if the minute book plan is preferred, a small skeleton calendar or "tickler" may be prepared in addition, which, kept on the desk, will call attention to the dates upon which the calendar in the minute book should be consulted.

The calendar which follows is given merely to show the general plan and the matter which is usually included. It is arranged for a New York corporation having its principal place of business in the City of New York and holding its annual meeting of stockholders on the third Wednesday of January at 10.30 A.M., with quarterly meetings of directors on the third Thursday of January, April, July, and October,

at 4 P.M. Its by-laws require ten days' notice of annual meetings and five days' notice of directors' meetings. Its stock book is closed fifteen days before the annual meeting.

It will be noticed that under this arrangement the January directors' meeting will usually fall on the day following the annual meeting at which directors are elected. If, then, this election is duly held, the regular notice of the directors' meeting is of no effect as to the newly elected directors, and, if the by-laws are mandatory as to notice, the meeting must be postponed or omitted, or the secretary, disregarding the notice already given, may provide for the meeting of the board on the proper date by means of a call and waiver signed by all the newly elected directors. (See Form 55.)

In the calendar which follows the date for each corporate act, as filing reports, payment of taxes, etc., is in most cases entered fifteen days in advance of the last day allowed by law, while a memorandum is also entered as a precautionary measure on the last day. Thus, a report that may be deferred if desired until the 31st day of January, is entered on the calendar under date of January 16th. This is a matter that may be varied to suit the individual.

Form 197. Corporate Calendar—New York

CORPORATE CALENDAR

of the

HUDSON RIVER PACKING COMPANY

OF NEW YORK CITY

1917

January

1. *Last Day* for payment of State Income Tax.
2. *Close Transfer Books* for annual meeting of January 17, 1917.
3. *First Publication* of notice of annual meeting of stockholders in accordance with Sec. 25 of the Stock Corporation Law. (Publication may be dispensed with if

waived in writing by every stockholder of the corporation.)

7. *Mail Notice* of annual meeting to each stockholder of record at his last known post-office address.
10. *Second Publication* of notice of annual meeting of stockholders.
13. *Notify Directors* of meeting to be held January 18. If directors are elected at annual meeting (January 17), this notice will be vitiated as to all directors elected at such meeting and must be replaced by waiver of notice signed after election by all the newly elected directors.
15. *Franchise Tax Payable.* Must be paid before February 14. Based upon November report to State Tax Commission. Checks should be made payable to State Treasurer.
16. *Annual Report* to State Officials. Must be filed during January and not later than January 31 with Secretary of State. No filing fees. Blanks not supplied by officials. No penalty incurred for omission of the report unless such filing is requested by some stockholder or creditor of the Company, and not then if the report is filed within thirty days after the request is made.
17. *Annual Meeting* of stockholders at 10.30 A.M. (Held pursuant to notice sent out January 7.)
18. *Directors' Meeting* at 4 P.M. If directors were elected at annual meeting, waiver of notice should be signed by each new director.
31. *Last Day* for filing annual report.

February

13. *Federal Income Tax Report* must be filed on or before March 1.
14. *Last Day* for payment of State Franchise Tax without penalty.

March

1. *Last Day* to file Federal Income Tax Report.

April

14. *Notify Directors* of meeting to be held April 19.
19. *Directors' Meeting* at 4 P.M.

May

1. *New York City Taxes Payable.* Statement of amount may be obtained from Assessor's office. One-half of taxes on real property may be deferred till November 1 next.

June

1. *New York City Taxes.* If not paid, interest at 7 per cent from May 1 will be added on all personal taxes and the first half of the real estate tax.
15. *State Income Tax Report* must be filed on or before July 1.

July

1. *Last Day* to file State Income Tax Report.
14. *Notify Directors* of meeting to be held July 19.
15. *Federal Income Tax.* Last day to pay in time tax to Collector of Internal Revenue without penalty.
19. *Directors' Meeting* at 4 P.M.

October

1. *New York City Assessments* made for coming year (1918). If notice of amount is not received in early part of October, it should be sent for. Tax Commissioners usually send notice but are under no obligations to do so. Books are open for correction until November 15 as to real estate, and November 30 as to personal estate. Statements must be filed before that date.
13. *Notify Directors* of meeting to be held October 18.
18. *Directors' Meeting* at 4 P.M.

November

1. *Franchise Tax Report.* Must be sent in on or before November 15. Blanks furnished by and report made to State Tax Commission. No filing fees. Penalty may be incurred by failure to make this report.
   Second Half of real estate tax due.
15. *Last Day* for filing application for revision of real estate assessment.
30. *Last Day* for filing application for revision of personal estate assessment.

December

1. *Real Estate Taxes.* If second half of real estate tax is not paid, 7 per cent interest will be added from November 1.
16. *State Income Tax* payable January 1.

CHAPTER LXXXVII

CORPORATE BOND ISSUES

The more important instruments involved in an issue of corporate bonds are the bond itself, which is comparatively simple in form, and the mortgage or deed of trust, which is lengthy and complex.

The corporate bond in its usual form is a promissory note, differing from the ordinary corporate note only in its formality, its more complete statement of the conditions under which it is issued, its formal execution, and in its being one of a series of like obligations secured by the same collateral. (See Form 198.)

There is practically no difference as to form between the bonds and the short-term note so frequently issued by corporations of the present day, save as to the length of time for which they run. The short-term note, as its name indicates, is usually given for a short period—one to five years—while the bond usually extends over a much longer period, ranging from five to one hundred years or more.

Interest on bonds is usually represented and provided for by means of coupons, which are in effect promissory notes, payable to bearer, each calling for the payment of one instalment of interest on the bonds. (See Form 199.) This interest when due is payable only on surrender of the proper coupon and, in the absence of some good reason otherwise, such as notice that the particular coupon has been stolen, is payable to anyone who presents the coupon.

Interest on bonds is usually payable semiannually and each of the coupons of a coupon bond calls for the exact amount

of one of the semiannual interest payments on that bond. Thus, a bond running ten years with interest payable semiannually, will have attached to it twenty coupons. Each coupon bears the same number as its bond for purposes of general identification, but also has a serial number or some specific statement indicating the order in which it comes due and the particular interest payment for which it calls.

Coupon bonds are usually made payable to bearer, and ownership passes by delivery. When it is desired that bonds shall not pass by mere delivery, they are registered, i.e., issued in the name of some particular person as is a certificate of stock, the bond thereafter being transferable only on the books of the company.

Coupon bonds are sometimes registered as to principal, but the coupons are still made payable to bearer. The interest then is paid to anyone who presents the coupon, but the principal when due is paid only to the person in whose name the bond stands on the books of the company.

Bonds without coupons are always registered, are transferred only by assignment, interest is payable to the registered owner alone, and is usually paid by check sent out to these registered owners.

Coupon bonds payable to bearer and registered bonds without coupons are often issued under the same deed of trust. Usually when this is done, the two classes of bonds are made interchangeable, i. e., the holder of a coupon bond may at any time exchange it for a registered bond, or vice versa. The advantage of the unregistered coupon bond is found in the readiness with which it may be transferred. The advantage of a registered bond lies in the difficulty of its negotiation in case the bond is lost or stolen.

The bond register is a book of record in which are entered the data relating to bond issues, showing for each bond, its number, date, names of the parties to whom issued, any trans-

fers, and the due dates and amounts of interest payments. The coupon register is, as its name indicates, a book in which coupons, clipped and presented for payment, are, after cancellation, pasted in convenient form for subsequent reference.

The following form is that of a coupon bond, the ownership passing by mere delivery. It may, however, be registered at the option of the owner, though this registration does not affect the coupons. (See Form 199.) These pass by delivery alone and are payable to bearer regardless of whether his bond be registered or transferable by delivery.

Form 198. **Coupon Bond**

UNITED STATES OF AMERICA
STATE OF NEW YORK

No. 375. $500.00

MAXWELL COMPRESSOR COMPANY
First Mortgage Six Per Cent Gold Bonds

KNOW ALL MEN BY THESE PRESENTS, That the Maxwell Compressor Company, a corporation organized under the laws of the State of New York, for value received, hereby promises to pay to the bearer hereof, or if this bond is registered, to the registered holder thereof, at the office of the Securities Trust Company of the City of New York, on the first day of December, nineteen hundred and forty-seven, in gold coin of the United States of America, of the present standard of weight and fineness, or its equivalent, the sum of Five Hundred Dollars, without deduction from either such principal or interest for or on account of any United States, State, municipal, or other tax or taxes which the Maxwell Compressor Company, its successors or assigns, may be required to pay or deduct therefrom, and the Maxwell Compressor Company hereby covenants and agrees to pay all such tax or taxes, and in the meantime to pay interest upon the said sum of Five Hundred Dollars from and after the first day of December, nineteen hundred and seventeen, at the rate of six per cent per annum, payable in like gold coin, or its equivalent, at the same place, semiannually, on the first days of June and December in each year, beginning with the first day of June, 1917, on presentation and surrender of the coupons hereto attached as each of them becomes due.

This bond is one of a series of One Thousand (1,000) bonds of the same tenor and date, aggregating Five Hundred Thousand Dollars ($500,000), numbered consecutively from one to one thousand, both inclusive, for the sum of Five Hundred Dollars ($500) each, all of which bonds are secured equally by a deed of trust, which is a first

mortgage upon the properties of the Maxwell Compressor Company, executed and delivered by the said Maxwell Compressor Company to the said Securities Trust Company, as Trustee, granting and conveying in trust and mortgaging as security for the payment of the principal of said bonds at maturity, at par, and the interest on said bonds, payable semiannually at the rate aforesaid, all the real estate and other property of the said Maxwell Compressor Company mentioned and described in said deed of trust, with full power to use and sell the same in the event of default in payment of the bonds or coupons, or any of them, and apply the proceeds to the payment of same as in said deed of trust provided. This bond is issued, received, and held subject to all and singular the terms and conditions contained in the deed of trust aforesaid.

This bond is further secured by a sinking fund, which shall consist of and be maintained by the payment to the said Securities Trust Company by the Maxwell Compressor Company on the first day of December, 1922, and on each succeeding first day of December thereafter, until the redemption of all the bonds issued under said deed of trust, of twenty-five dollars for each thousand dollars of bonds then issued and outstanding, such moneys so paid to be used in the purchase of outstanding bonds at the lowest price at which they may be had, not exceeding, however, one hundred and ten per centum of the face of said bonds plus accrued interest, and if bonds cannot be so purchased, such moneys shall be used in the redemption of the bonds outstanding, as hereinafter provided.

This bond shall not become obligatory until the certificate indorsed hereon shall be signed by the Trustee, and when so authenticated by the signature of the trustee the title to said bond shall pass by delivery, unless said bond is registered, and, if registered, the title thereto shall pass only by transfer on the books of said Trust Company, and no transfer except upon said books shall be valid unless the last transfer shall have been to bearer, which shall restore transferability by delivery.

This bond is redeemable, at the option of the Maxwell Compressor Company, on any interest day at any time after the first day of December, 1922, at 110 per cent of its face value, plus accrued interest, provided that thirty days' notice of such redemption shall be given the holder thereof by notice published once a week for four consecutive weeks prior to such redemption, in a newspaper published in New York City.

In Witness Whereof, the said Maxwell Compressor Company hath caused these presents to be signed by its President, and its corporate seal, duly attested by its Secretary, to be hereunto affixed, and hath hereunto affixed coupons with the name of its Treasurer engraved thereon, and hath caused this bond to be dated the first day of December, A. D. one thousand, nine hundred and seventeen.

{ corporate seal }

Maxwell Compressor Company,
By Howard M. Maxwell,
President

Attest:
Frank Paulson,
Secretary

The coupon form which follows is as it appears attached to the preceding bond.

Form 199. Coupon

No. 1 $15.00

MAXWELL COMPRESSOR COMPANY

will pay to the bearer at the office of the Securities Trust Company of the City of New York the sum of Fifteen Dollars ($15), in United States Gold Coin, or its equivalent, on the first day of June, 1918, being six months' interest on its First Mortgage Six Per Cent Gold Bond No. 375.

WILLIAM H. POWERS,
Treasurer

The following trustee's certificate is as it appears upon the bond shown in Form 198.

Form 200. Trustee's Certificate

The Securities Trust Company of the City of New York hereby certifies that the within Bond is one of the series of Bonds described in the Deed of Trust therein mentioned.

SECURITIES TRUST COMPANY OF THE
CITY OF NEW YORK,
Trustee
By MALCOLM MCDOUGALD,
President

The formalities of a bond issue are usually regulated by the statutes of the particular state in which the corporation is organized. Thus in New York an issue of bonds requires (1) a stockholders' resolution or written consent; (2) a certificate of the corporate officials that the stockholders' consent has been given; and (3) a directors' resolution reciting the facts, authorizing the officers to proceed in the matter, and providing for the details of the transaction. The matter is one to be undertaken only by a skilled lawyer.

In some states the mere resolution of the board of directors is sufficient to authorize a bond issue. In a large number of states the assent of a prescribed majority of the stockholders is a requisite. As a matter of prudence and good business, a

proper stockholders' authorization is always desirable regardless of the statute requirements existing in the particular state.

The following deed of trust, while drawn in compliance with the requirements of the New York statutes, may be readily adapted for use in any other state.

Form 201. Deed of Trust

DEED OF TRUST

THIS INDENTURE, made and entered into this 12th day of November one thousand nine hundred and seventeen, by and between the Maxwell Compressor Company, a corporation duly organized and existing under the laws of the State of New York, having its office at No. 170 Broadway, New York City, hereinafter called the Compressor Company, party of the first part, and the Securities Trust Company of the City of New York, a corporation duly organized and existing under the laws of the State of New York, having its principal office at No. 98 Wall Street, New York City, as Trustee, hereinafter called the Trustee, party of the second part; Witnesseth:

WHEREAS, The Board of Directors of the said Compressor Company has, by the authority and with the consent of the stockholders thereof legally given, duly resolved to borrow Five Hundred Thousand Dollars ($500.000) for the lawful business purposes of the said Company, and for that purpose to execute and issue its first mortgage six per cent thirty-year gold bonds of the par value of five hundred dollars each, dated the first day of December, 1917, and payable on the 1st day of December, 1947, in gold coin of the United States of, or equivalent to, the present standard of weight and fineness, said bonds to bear interest at the rate of six per cent per annum, payable in like gold coin, semi-annually, on the first days of June and December in each year, from the first day of December, 1917, until the payment of the principal amount thereof; the payment of the principal and interest of said bonds to be secured by a mortgage or deed of trust that shall be a first mortgage on the entire property of the said Compressor Company as hereinafter described, said deed of trust to be in substantially the form of this indenture; and

WHEREAS, The bonds so to be issued are to be in substantially the form following, viz.:

(See Form 198.)

AND WHEREAS, There are to be attached to each of the said bonds, at the time of the issue thereof, coupons representing the semiannual instalments of interest which are to become due thereon, each of which coupons is to be substantially of the following tenor, the proper coupon number, date of payment, amount of the bond and its number, and the engraved

fac-simile signature of the Treasurer of the Compressor Company, having been inserted in the respective blanks therefor, to wit:

(See Form 199.)

And Whereas, On each of said bonds there is to be indorsed a certificate of the Trustee or its successor appointed hereunder, of the following tenor:

(See Form 200.)

Now, Therefore, the said Compressor Company, in consideration of the premises and of the sum of one dollar to it in hand paid by the said Trustee, the receipt whereof is hereby acknowledged, and in order to secure the due payment of the principal and interest of the bonds to be issued hereunder, and to insure the faithful performance of the covenants and agreements herein contained, hath granted, bargained, sold, aliened, assigned, conveyed, transferred, and set over, and by these presents doth grant, bargain, sell, alien, assign, convey, transfer, and set over unto the said Trustee, its successors and assigns;

All of the following described property and franchises of the Company, to wit:

(Specific description of the property mortgaged.)

To Have And To Hold all and singular the said property, with all real estate, buildings, fixtures, articles, and property of every kind, belonging to or pertaining to the same unto the said Trustee, its successors and assigns forever;

In Trust, Nevertheless, for the equal pro rata benefit and security of any and all persons and parties who may be or become the owners or lawful holders of any of the bonds to be issued hereunder and secured hereby, irrespective of date or priority of issue, without any discrimination, preference, or priority of any one bond over another or others, by reason of priority in time of issue, or sale, or negotiation thereof, or otherwise, and to secure the due payment of each of the said bonds together with the interest thereof, and for the uses and purposes and upon the terms and conditions hereinafter declared and expressed; and

It Is Hereby Expressly Covenanted and Agreed by and between the parties hereto that all such bonds are to be issued, negotiated, and received, and that the said property and franchises mortgaged are to be held by the Trustee upon and subject to the following further trusts, uses, conditions, and covenants, that is to say:

First—The bonds to be issued hereunder shall be executed on behalf of the Compressor Company by its proper officers and shall be delivered to the Trustee for certification, and said Trustee shall certify and deliver said bonds so certified upon the order of the Board of Directors of the Compressor Company. An order purporting to be the order for delivery of said bonds and believed by the Trustee to be genuine shall be conclusive authority and full protection to the Trustee for the certification and delivery of the bonds.

Only such bonds as shall bear thereon indorsed the Trustee's certificate, duly executed, shall be secured by this indenture, or entitled to any lien, right, or benefit thereunder, and such certificate of the Trustee upon any such bond executed by the Compressor Company shall be conclusive evidence that the bond so certified has been duly issued thereunder, and that the holder is entitled to the benefit of the trust hereby created.

Before certifying or delivering any bond, all coupons thereon then matured shall be cut off, cancelled, and delivered to the Compressor Company.

Second—All bonds secured hereunder may be registered in the name of the holder, when so requested by such holder, upon bond transfer books which the Compressor Company shall maintain and keep for such purpose at the office of the Trustee in the City of New York as long as any of the said bonds shall remain outstanding. After such registration such bonds shall be transferable only upon such transfer books, by the registered owner or his lawful attorney, and any such transfer shall be noted on the bonds by the indorsement of the Transfer Agent hereinafter appointed. After registration of any bond, the principal thereof shall be payable only to the registered owner, but the coupons shall be payable to the bearer upon presentation and surrender thereof, and shall be negotiable by delivery as if such bond was not registered.

Any registered bond may at any time be transferred by the registered owner thereof, upon said transfer books to bearer, and such transfer shall be noted upon said bond, and the said bond shall thereupon be negotiable by delivery as if it had never been registered, and each of said bonds shall continue subject to successive registrations and transfers to bearer at the option of the holder thereof.

For the purpose of registering and transferring said bonds as above set forth, the Securities Trust Company of the City of New York is hereby appointed and constituted Transfer Agent of the said Compressor Company.

Third—Until default shall be made by the Compressor Company, its successors or assigns, in the payment of the principal or interest of the bonds hereby secured, or any of them, or in the performance of any of the covenants, agreements, and provisions on its part to be kept and performed, as herein set forth, the Compressor Company, its successors and assigns shall be permitted to possess, manage, use, and occupy the premises affected hereby, with all their appurtenances and belongings in all respects as fully as if this indenture had not been made.

Fourth—If the Compressor Company shall well and truly pay to the holders thereof the principal of the bonds secured hereunder and the interest moneys becoming due thereon respectively at the time and in the manner specified in the said bonds and coupons thereto annexed, and shall keep and perform all the covenants, agreements, and stipulations on its part in said bonds or in this agreement contained, then these presents and the trust hereby created shall cease and determine, and the said Trustee shall in such event release and discharge this mortgage and the property and premises encumbered thereby. The Trustee may also execute such release and discharge upon production by the Compressor Company or its assigns of all the bonds issued hereunder, together with the coupons thereto belonging, cancelled or for cancellation, and the Trustee shall not be under any liability or obligation to inquire into the holding of said bonds by the Compressor Company or its assigns.

Fifth—The said Compressor Company, while it shall be in possession of the mortgaged premises, and while there shall be no existing default in respect of the payment of the principal or interest of any of the said bonds of the Compressor Company, or in the performance of any of the cove-

nants herein, may, with the consent in writing of the Trustee, sell any portion of the premises heretofore granted. If, in the opinion of the Board of Directors of the Compressor Company, such sale or change shall be expedient, said opinion shall be expressed in a resolution of the said Board, and the Trustee may upon delivery to it of a copy of the resolution of the Board of Directors to that effect release from the lien and operation of this indenture any part of the premises hereby mortgaged, provided that the purchase money from such sale or sales shall be paid to the said Trustee for application to the discharge of the bonds and coupons hereunder issued, as set forth in Section Fifteenth, or to be set aside to be applied by the Compressor Company in payment for other real or personal property or in betterments of or additions to some part of the premises mortgaged hereby, and until so applied shall be held by the Trustee. Any new property so acquired by the Compressor Company shall *ipso facto* become and be subject to the lien of this indenture as fully as if specifically mortgaged or pledged hereby, but if requested by the Trustee the Compressor Company shall execute special instruments of incumbrance upon such properties.

Sixth—The Compressor Company covenants and agrees that it shall and will promptly pay the interest and the principal of the bonds hereby secured, at the time and in the manner specified in said bonds and the coupons thereto attached, without deduction from either such principal or interest for or on account of any United States, State, municipal, or other tax or taxes which the Compressor Company, its successors or assigns, may be required to pay or deduct therefrom, and the Compressor Company hereby covenants and agrees to pay all such tax or taxes.

The Compressor Company further covenants and agrees that it shall and will, from time to time, promptly pay and discharge, or cause to be paid and discharged, all taxes, rates, levies, or assessments and charges, ordinary and extraordinary, levied or imposed upon the premises and properties mortgaged to the Trustee to secure the payment of the bonds issued hereunder, whereby the lien of this indenture might or could be held prior or equal to the lien of this indenture, so that the same shall not fall into arrears and so that the priority of this indenture given to secure said bonds shall be preserved.

The Compressor Company further covenants and agrees that it will not create nor suffer any mechanic's, laborer's, or other similar liens to be created upon the premises and property mortgaged to secure the bonds issued hereunder, whereby a lien might be created that might or could be impaired, until the bonds so secured hereunder, with all the interest accrued thereon, shall have been fully paid and satisfied.

Seventh—A sinking fund shall be created for the redemption of the bonds issued hereunder. It shall consist of and be maintained by the payment to the Trustee by the Compressor Company on the first day of December, 1922, and on each succeeding first day of December thereafter until the redemption of all the bonds issued hereunder, of twenty-five dollars for each thousand dollars of bonds then issued and outstanding, such moneys so paid to be used in the purchase of outstanding bonds at the lowest price at which they may be had, not exceeding, however, one hundred and ten per centum of the face value of said bonds, plus accrued interest, and if bonds cannot be so purchased, such money shall be used in redemption of bonds outstanding as provided and set forth in Section Fifteenth of this present indenture.

Eighth—The Compressor Company covenants and agrees that this deed of trust delivered to the Trustee shall be a first mortgage upon the premises and property affected thereby, that the same shall be duly executed and recorded in the proper office of registry in the County of New York where the said premises are situated, and that the Compressor Company will execute and deliver such further deeds, transfers, pledges, and assurances as the Trustee, under the advice of counsel learned in the law, shall reasonably require for the better accomplishing of the purposes and provisions of this indenture.

Ninth—The Compressor Company covenants and agrees that all buildings, structures, and machinery situated upon the properties affected by this mortgage given to secure the bonds issued hereunder, shall be kept insured during the entire term of this indenture to the amount of insurance on such properties usually allowed by insurance companies, against loss or damage by fire, and against loss or damage from boiler explosions, and that the said Compressor Company shall and will pay all premiums upon all policies for such insurance. All such policies shall be made payable to the Trustee, and shall be deposited with it for the benefit and protection of the bondholders should any loss occur from fire or boiler explosion during the term of this indenture. Any payments of insurance made under such policies may be applied directly by the Trustee to the repairing or replacement of the property damaged or destroyed, or it may authorize the Compressor Company to contract for such repairs or replacements, and pay part or all of the cost thereof from said insurance moneys. The Trustee may in its discretion employ such insurance moneys in the purchase or redemption of outstanding bonds as set forth in Section Fifteenth, instead of expending the same for repairs or replacement of property damaged or destroyed.

Tenth—The Compressor Company covenants and agrees that it shall and will at all times keep the buildings, structures, and appurtenances thereto, or any replacement or replacements thereof in good order and repair, provided, however, that in the event of total destruction of any building, the Compressor Company may, with the consent of the Trustee, add to the insurance moneys received thereon by the Trustee sufficient cash payments to release the special property upon which such building was situated, under the terms set forth in Section Fifth, whereupon the Trustee shall release the said property and the Compressor Company may dispose of the same at its discretion.

Eleventh—The Compressor Company covenants and agrees that when and as the coupons attached to the bonds issued hereunder are paid, the coupons shall be cancelled, and that no purchase or sale of the said coupons or advance or loan upon the same, made on behalf of, or at the request of, or with the privity of the said Compressor Company, and no redemption of the said coupons, or any of them, by any guarantor of the payment of the same, shall be taken or operate as keeping the said coupons alive or in force under this indenture as against the holders of the bonds secured hereunder and of the coupons annexed thereto.

Twelfth—In case default shall be made in the payment of interest on any of the bonds issued hereunder, and such default shall continue for a period of six months after demand, or in case default shall be made in the performance of any other covenant or condition hereby required to be kept or performed by the Compressor Company, and if the same shall

continue for a period of six months after demand made for such performance, the Trustee may, and, upon the written request of the majority in amount of the holders of the bonds then outstanding, shall by written notice to the Compressor Company, declare the principal of all the bonds hereby secured, then outstanding, to be, and the same shall thereupon become immediately due and payable.

Thirteenth—In case default shall be made in the payments of the principal or interest of any of the said bonds when the same is due and payable according to the tenor thereof, or if default shall be made in the performance of any other covenant or condition, hereby required to be kept or performed by the Compressor Company, and if any such default in payment or performance shall continue for a period of six months after demand by the Trustee, then and in every such case the Trustee, or its successors in the Trust, may by its attorneys and agents enter into and upon all and singular the premises hereby conveyed, and each and every part thereof, and operate and conduct the business of the said Compressor Company in all respects as the said Compressor Company might do in possession of the same; and may collect and receive all rents, income, revenue, and profit to be derived therefrom, and after deducting all proper and necessary outlays and expenses as well as a just compensation for its own services and for the services of such attorneys, agents, and assistants as it may, in its discretion, employ for any of the purposes aforesaid, said Trustee shall apply the rest and residue of the moneys received by it pro rata to the payment of the interest due upon such of said bonds as shall then be outstanding. In any such case if payment of all interest and any principal due shall be made in full and no suit to foreclose this mortgage shall have been begun or sale made, the said Trustee shall restore the possession of the premises so entered, to the Compressor Company without prejudice to similar entry later in case of similar default.

Fourteenth—In case default shall be made in the payment of the principal or interest of the said bonds, when the same is due and payable according to the tenor thereof, or if default shall be made in the performance of any other covenant or condition hereby required to be kept or performed by the Compressor Company, and if any such default in payment or performance shall continue for the period of six months after demand, the Trustee may, and upon written request of the holders of a majority in amount of the registered bonds then outstanding, being first indemnified by them to its satisfaction, shall sell or foreclose upon, according to the proceedings by law prescribed in this state, all or any portion of the property held by it under this indenture, and such proceedings of sale or foreclosure shall be a perpetual bar both at law and in equity against the Compressor Company and against all persons claiming by, from, or under it. After deducting from the proceeds of such sale or foreclosure, the proper allowance for all expenses thereof, including attorney's and counsel fees, and all other expenses or advances which may have been made or incurred by said Trustee in respect of the said property or the appurtenances thereto, and all payments which may have been made by it for taxes or assessments, or in satisfaction of charges and liens, prior to the lien of the mortgages and deeds of trust to the Trustee thereon, or for insurance, as well as reasonable compensation for its own services, the Trustee shall apply the proceeds to the payments of such bonds and the coupons thereon as may be at the time unpaid, without giving preference

or priority to one bond over another, but ratably to the aggregate amount of such unpaid principal and accrued and unpaid interest, and if any surplus remain after the payment in full of the principal and interest of said bonds, then the Trustee shall transfer and pay over such surplus to the Compressor Company.

Fifteenth—It is covenanted and agreed between the parties hereto and any future holders of the bonds that the said bonds are redeemable, at the option of the party of the first part, on any interest day after the first day of December, 1922, at one hundred and ten per cent of their face plus accrued interest, provided that thirty days' notice of such redemption shall be given the holders thereof, by notice published once a week for four consecutive weeks prior to such redemption, in a newspaper in New York City. If said bonds are registered, then a copy of the said notices shall be sent to the post-office address of the parties in whose names said bonds are registered.

Whenever it is desired to redeem any of said bonds, the Board of Directors of the Compressor Company shall pass a resolution setting forth the amount of bonds (at their par value) desired to be redeemed. The President of the Compressor Company shall thereupon draw by lot the numbers of the bonds to be redeemed, and he shall thereupon certify that such bonds were drawn for redemption, which certificate shall be entered upon the minutes of the Compressor Company, and a duplicate copy shall be delivered to the Trustee. Said bonds having been so drawn for redemption shall become due and payable on the succeeding interest payment date, provided that the date of first publication and the date of mailing notice to registered holders of bonds hereinbefore provided for shall have been not less than thirty days prior to such interest payment date, and the said bonds shall from such interest payment date, cease to draw interest, and the said Compressor Company may, upon the deposit of the proper amount with the Trustee, be privileged to consider said bonds as paid and cancelled.

Sixteenth—The Trustee may resign the trust hereby created upon giving sixty days' notice in writing to the Compressor Company. In case of the resignation of the Trustee, or of its dissolution or insolvency, or removal for cause as Trustee hereunder, it shall be the duty of the Compressor Company to call a meeting of the bondholders by printed notice, published in two of the public newspapers of New York City, once a week for three consecutive weeks next preceding such meeting, calling such meeting to be held in the said City of New York, and by mailing notice of the same to each of the registered bondholders not less than ten days before the date of such meeting. At the time and place specified in such notice, the holders of said bonds, in such meeting assembled, shall organize and proceed to elect a suitable corporation to act as Trustee under this agreement, and a majority in amount of such bonds legally represented at such meeting shall be competent to elect such new Trustee, and the corporation so elected shall immediately upon election and on its acceptance in writing of such trust become vested with all the estate, trusts, rights, powers, and duties of the present Trustee herein, and shall be entitled to receive from the present Trustee or its legal representatives all moneys, mortgages, and assurances appertaining or relating to this trust and the due execution thereof.

Seventeenth—It is covenanted and agreed by the parties hereto, and all the holders of bonds hereunder, as conditions precedent to the accept-

ance of the said trust by the said Trustee, or any successor thereto, as follows:

The Trustee shall not be answerable for any act, default, neglect, or misconduct of any of its agents or employees, by it appointed or employed, in connection with the execution of any of the said trusts, nor in any other manner answerable or accountable, under any circumstances whatsoever, except for bad faith. The recitals contained herein, or in the bonds, as to priority of lien, or any other matter whatsoever, are made by and on the part of the Compressor Company, and the Trustee assumes no responsibility for the correctness of the same. It shall not be the duty of the Trustee to file or record at any time this deed of trust or any other mortgages or deeds of trust that may be required hereunder, nor to do any other act or acts suitable and proper to be done for the creation or continuance of the lien or liens thereby intended, nor to effect insurance against fire or explosion, nor to renew any policies of insurance, nor to keep itself informed as to the payment of any taxes or assessments, nor to require such payments to be made. The Trustee may, however, in its discretion, do any or all of these things. Neither shall the Trustee be held responsible for the nature or amount of the security mortgaged to it hereunder. The Trustee shall not be compelled to take any action, as Trustee, under this mortgage, unless properly requested and in every respect indemnified to its full satisfaction. The Trustee shall be entitled to reasonable compensation for all services rendered hereunder or in connection with the trust. This compensation, together with any and all necessary and reasonable expenses, charges, counsel fees, and other disbursements incurred by the Trustee in the discharge of its duties, as such, shall be paid by the Compressor Company, or out of the trust estate upon which they are hereby made a lien, prior to that of the bonds issued hereunder. The Trustee shall be protected in acting upon any notice, consent, request, certificate, bond, or other paper or document believed by it to be genuine and due authentication by certificate of the bonds issued hereunder, and for the custody and disposition, as herein provided, of the securities and moneys received by it hereunder.

Eighteenth—It is covenated and agreed between the parties hereto that the words "Compressor Company" when used in these presents mean the party issuing the bonds herein referred to; that the word "Trustee" means the corporation charged with the execution of the trust herein, whether the same be the Securities Trust Company of the City of New York, or any successor or successors in the trust hereby created; that the word "bonds" means the bonds issued hereunder; and the words "Trustee," "bond," "bondholder," and "holder" shall include the plural as well as the singular number and the term "majority" shall signify the majority in amount.

Nineteenth—It is covenanted and agreed that this indenture may be executed in several counterparts, each of which so executed shall be deemed to be an original, and such counterparts shall together constitute but one and the same instrument.

In Witness Whereof, the Maxwell Compressor Company has caused its corporate name to be hereunto subscribed by its President and its corporate seal to be affixed and attested by its Secretary, and the Securities Trust Company of the City of New York, in token of its acceptance of the trust hereby created, has caused its corporate

name and seal to be hereunto affixed by its President, and attested by its Secretary, on this twelfth day of November, one thousand nine hundred and seventeen.

MAXWELL COMPRESSOR COMPANY,
{ CORPORATE SEAL }
By HOWARD M. MAXWELL,
President

Attest:
FRANK PAULSON,
Secretary

SECURITIES TRUST COMPANY
OF THE CITY OF NEW YORK,
As Trustee
{ CORPORATE SEAL }
By MALCOLM MCDOUGALD,
President

Attest:
FRANK G. COOPER,
Secretary

(Notarial acknowledgment by president of each corporation as given in Form 181.)

It will be understood that the preceding form has, on account of space limits, been reduced to its simplest terms. It is, however, a good working model and will afford an excellent basis upon which to build up a more elaborate instrument when required.

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